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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 844

CARL H. WILLIAMS; JOHN W. WILLIAMS; MRS. JOHN A. CLINE, JR.; JOHN A. CLINE, JR.; MRS. F. S. HOLLEBEKE; F. S. HOLLEBEKE; PAUL EUGENE WILLIAMS, JR.; LOTTIE MAY TREAS; ROBERT M. TREAS; BYRON LESLIE WILLIAMS; MARVIN LESTER WILLIAMS; RUBY LEONA WILLIAMS; JESSIE R. WILLIAMS; and EDITH LILLIAN WILLIAMS, single, who is incompetent and who brings this suit by her next friend, CARL H. WILLIAMS,

Petitioners,

—against—

PACIFIC ROYALTY COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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—against—

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Respondent.

No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case June 21, 1955 (App. 71).*

*References marked "App." are to the Appendix to this petition; those marked "R." to the Record.

OPINIONS BELOW

The opinions of the district court are unreported and are printed in the Appendix at pages 21-69.

The opinion of the court of appeals is reported at 227 F. 2d 49 and is printed in the Appendix at pages 1-19.

The order of the court of appeals denying rehearing, with the dissent thereto, is unreported and is printed in the Appendix at page 73.

JURISDICTION

The judgment of the court of appeals, reversing the decision of the district court, was entered June 21, 1955 (App. 71). Rehearing was denied December 12, 1955 (App. 73).

Petitioners' time within which to file a petition for a writ of certiorari was extended to April 10, 1956, by an order signed by Mr. Justice Clark on February 21, 1956.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Whether under the law of New Mexico a mortgagor's equity of redemption is wiped out by a conveyance of the equity induced by material misrepresentations of the mortgagee's agent, made with the purpose and effect of acquiring beneficial ownership of the property for himself.

STATEMENT

Petitioners are the heirs of Lester L. Williams, homesteader and mortgagor. Respondent is a corporation, wholly-owned by the heirs of J. E. Whitehead, an attorney,

a speculator in oil and land and the fraudulent agent of the mortgagee [the Bates estate] (R. 165, 171-173, App. 14).

In 1919, Williams obtained a patent on 320 acres of farm land in Lea County, New Mexico (Pl. Ex. 1, R. 158, 589) and immediately thereafter borrowed $900, upon a note and mortgage for that amount. Having become ill and impoverished by 1925, Williams had moved off his land and to San Angelo, Texas, defaulting in his payments of interest (Pl. Ex. 10, R. 188, 693). The mortgage thereupon went for collection to a corporation owned by Whitehead (Pl. Ex. 10, R. 188, 692). Foreclosure was thereafter instituted, Whitehead signing the complaint in the foreclosure suit as attorney for the plaintiff-mortgagee (Pl. Ex. 21, R. 407, 610-617).

Although unauthorized to do so by the mortgagee, Whitehead immediately sought to induce Williams to deed away his property (Pl. Ex. 10, R. 188, 712-713). The deed that Whitehead finally procured from Williams conveyed the Williams land to a "straw man", one C. H. McKinney, who held it for Whitehead. The mineral rights in the Williams land are now worth approximately $1,000,000.

Williams was inveigled into conveying his land to McKinney by reason of multiple misrepresentations made to him by Whitehead. Thus, having obtained by letter Williams' waiver of appearance in the foreclosure suit, Whitehead promptly sent Williams a second letter, enclosing a deed for execution. That letter told Williams that should he sign the enclosed deed conveying his farm

> "... to the investor ... we can then dismiss the suit and that would save a deficiency judgment against you." (Pl. Ex. 10, R. 188, 713.)

The enclosed deed, of course, contained the name of Whitehead's "straw man" McKinney, as grantee.

Williams replied to Whitehead, asking who McKinney was and whether the mortgagee would allow him to redeem his home (Pl. Ex. 10, R. 188, 714-715). Whitehead gave false replies to both questions. He told Williams

> "... if you want to redeem this property at any time, we will be glad to hear from you as this estate does not want the land . . . you can certainly buy it at any time before the estate sells it ..." (Pl. Ex. 10, R. 188, 714.)

In response to the query as to McKinney's identity, Whitehead falsely described him as a relative of the deceased mortgagee who was taking title to the property to keep it from being involved in the estate proceedings (Pl. Ex. 10, R. 188, 714).

Williams then asked Whitehead to confirm that McKinney had the power to release Williams from his obligation on the note and mortgage (Pl. Ex. 10, R. 188, 715). To this inquiry, Whitehead again falsely replied, stating that he had the note and mortgage in hand, which he would deliver when Williams sent him the deed, ending Williams' liability (Pl. Ex. 10, R. 188, 715). Whitehead then held neither the note nor the mortgage (Pl. Ex. 10, R. 188, 745) and had no authority from the mortgagee to release Williams in exchange for a deed to his land (R. 481, 499, 903). On November 26, 1926, Williams executed the McKinney deed that had been sent to him by Whitehead (Pl. Ex. 1, R. 158, 632-634). By the terms of that deed, McKinney assumed the obligation of the mortgage, thus leaving the mortgage alive and Williams as surety thereon for McKinney's performance.

McKinney, contrary to Whitehead's representations, was not even remotely related to the mortgagee or her family (R. 51, 197). He was a tenant farmer of White-

head (R. 190-191).* He accommodated his landlord by signing blank deeds (R. 193-195). Whitehead would thereafter inscribe those deeds with the names of grantees and descriptions of properties (R. 193-195, 209-211).

In his answers to Williams' letters, Whitehead misrepresented that the Williams land would be accepted in full settlement of the mortgage debt (Pl. Ex. 10, R. 188, 714); that Williams might redeem his land "any time before the estate sells it" (Pl. Ex. 10, R. 188, 714); that Williams' liability would be cancelled by surrender of the note and mortgage (Pl. Ex. 10, R. 188, 715); that the foreclosure suit would be dismissed so that a deficiency judgment might not be taken against Williams (Pl. Ex. 10, R. 188, 713-716). Having brought on the foreclosure suit, Whitehead pressured Williams by telling him that his land would not sell for more than half his debt and that, in such case, Williams would be hounded by a deficiency judgment (Pl. Ex. 10, R. 188, 713). But even while he was thus coercing Williams, Whitehead, by use of one of his blank McKinney deeds, had put the property beyond the redemption he had promised Williams. By deed dated October 16, 1926, a date four days prior to filing of the foreclosure suit, Whitehead, through his "straw man" McKinney, conveyed the Williams property to respondent, free and clear of all encumbrances (Pl. Ex. 1, R. 158, 608-610).** Contrary to

---

*At the trial, McKinney testified that he had never known anything about the land involved, that he had never known anything of Lester Williams and that he never authorized Whitehead to accept a deed to the Williams land for him (R. 206-207).

**This deed was not recorded by Whitehead until 1948 (Pl. Ex. 1, R. 158, 609-610). However, a deed from McKinney, conveying the mineral rights in the Williams land to Whitehead's company, the respondent, was purportedly executed January 3, 1927. This deed recites that it was acknowledged in Tulsa, Oklahoma (Pl. Ex. 1, R. 158, 159, 635-637). At the trial, McKinney testified that he had never been in Tulsa and that he had never appeared before the notary who purportedly took the acknowledgment (R. 195).

Whitehead's promises and representations to Williams, the foreclosure suit against Williams was not dismissed with prejudice (Pl. Ex. 1, R. 158, 634-635). Moreover, the mortgage was never discharged in the lifetime of Williams (Pl. Ex. 1, R. 158, 160, 639-641), who died in 1929 (R. 302); and Williams' liability on the note continued to exist, the note never being cancelled or surrendered (Pl. Ex. 10, R. 188, 745-747, 768-771). In January 1928, Whitehead sold the surface rights to the Williams land for $1200 (Pl. Ex. 10, R. 188, 731), leaving the minerals in his wholly-owned corporation, the respondent. As Whitehead truly said in 1940, he was getting a "free ride" as regards the mineral estate (Pl. Ex. 10, R. 188, 782).

On July 10, 1952, petitioners brought suit in the United States District Court for the District of New Mexico, under 28 U. S. C. § 1332(a)(1), alleging jurisdiction based on diversity of citizenship (R. 8, 53), to have title to the mineral rights in the Williams land quieted in them; to have the deed that Williams had executed to McKinney rescinded; and to have a constructive trust impressed upon the moneys received and to be received by respondent by virtue of its claim of ownership of the mineral rights.

In their amended complaint (R. 52-59), petitioners allege that Whitehead fraudulently induced Williams to part with his land and his equity of redemption therein, which he would not otherwise have done, by misrepresenting (R. 57-58)

> "(a) That C. H. McKinney was a relative of Bates and would hold in trust for the Bates estate;
>
> "(b) That L. L. Williams would be afforded a first preferential right to repurchase his homestead at any time before the Bates estate sold same;
>
> "(c) That suit against L. L. Williams would be immediately and finally dismissed, his note returned

> and the mortgage released, with an end to all liability in exchange for his deed."

The district court, holding for petitioners, decreed that the mineral rights in controversy be vested in the petitioners and that respondent account for all sums received by, and accruing to, it by virtue of its claimed ownership of the minerals (R. 150). The district court reached its decision on the ground, among others, that every transaction in connection with the Williams land was tainted with fraud (App. 55, 61).

On appeal, the court below reversed the judgment of the district court, finding that no actionable fraud had been committed upon Williams (App. 13).* In reaching that conclusion the court of appeals observed (App. 11)

> ". . . The only false representation of an existing or pre-existing fact which Whitehead made to Williams was in his letter of November 18, 1926, wherein he wrote Williams that title was being taken in McKinney to prevent the title from becoming involved in the Bates Estate, and that McKinney was a relative who would hold it for the benefit of the estate. *This is the only fraud the plaintiffs relied upon in their pleadings.*" (Emphasis added)

The court of appeals thus eliminated from the complaint and from the action two out of three of petitioners' clear allegations and uncontradicted proofs of Whitehead's obliquity. The court below then concluded that for deeding his land to McKinney (App. 12)

> ". . . Williams received the consideration for which he bargained . . ."

---

*Like the district court, the court of appeals held that the petitioners are not barred by laches in prosecuting this claim (App. 41-45, 8-9).

The judgment of the district court was reversed June 21, 1955, and title to the mineral rights quieted in respondent.

A petition for rehearing, Murrah, J., dissenting, was denied December 12, 1955.

REASONS FOR GRANTING THE WRIT

A. Petitioners have alleged and proved the following misrepresentations made by Whitehead to Williams, and the trial court found that each was made to induce Williams to deed his land to the "straw man" McKinney. Whitehead misrepresented

> (a) that McKinney was a relative of the mortgagee and would hold the Williams land in trust for the mortgagee;
>
> (b) that Williams would be afforded a first preferential right to recover his homestead at any time before its sale by the mortgagee; and
>
> (c) that the foreclosure suit against Williams would be finally dismissed, his note returned and the mortgage released, with an end to all liability in Williams.

1. Each of those misrepresentations by Whitehead is a material misrepresentation, since it afforded "a decisive consideration on . . . [Williams'] willingness to contract." *Ham* v. *Hart,* 58 N.M. 550, 552, 273 P. 2d 748, 749. Being a material misrepresentation, each is adequate to support rescission or cancellation of the deed since each was believed and relied upon by Williams to his injury. It is the law of New Mexico that

> ". . . The culpability which stamps statements as a fraud is in the assertion of that to be true which is not true, although believed to be true, when made to be relied upon and which are relied upon to the injury of the party misled." *Ham* v. *Hart*, 58 N.M. at 552, 273 P. 2d at 749.

Clearly, under such a test, Whitehead committed fraud sufficient to warrant rescission of the Williams deed. He made false statements, knowing them to be false; he made them intending to deceive Williams; Williams relied upon those representations, and he was damaged to the extent that the consideration which he was supposed to receive was, and could only have been, far less than the value of the land at the time he made his conveyance to McKinney.*

2. The fact that Whitehead was acting for the mortgagee and was an attorney, attempting to foreclose the

---

*The record shows (a) that on February 28, 1927, Whitehead asked $2400 for the surface rights in the Williams land (Pl. Ex. 10, R. 188, 725-726); (b) that on January 18, 1928, Whitehead contracted to sell those surface rights for $1200 (Pl. Ex. 10, R. 188, 730-731); (c) that the mineral rights in the Williams land at the time Williams deeded that land to McKinney were worth from one to three dollars an acre (R. 557-558); and (d) that at the time the mortgage was released, the mineral rights were worth five dollars an acre (R. 557-558). Thus, at the time Williams conveyed to McKinney, his land was worth from $1520 to $2160, depending upon whether the minerals are valued at one or three dollars an acre, and at the time the mortgage was released, the Williams land was worth at least $2800. In contrast, at the time Williams conveyed to McKinney, his mortgage debt was approximately $1000 (Pl. Ex. 10, R. 188, 752) and at the time the mortgage was released, it was approximately $1200 (Pl. Ex. 10, R. 188, 752-753). Such disparity, in itself, is enough in New Mexico to warrant rescission of a conveyance from a mortgagor to a mortgagee of the equity of redemption. *Cf. McBride* v. *Campredon*, 24 N. M. 323, 171 Pac. 140. Certainly the value of the Williams land at the time of the conveyance to McKinney makes incredible the conclusion of the court of appeals that (App. 13)

> ". . . There was no evidence that Williams . . . relied upon the misrepresentation with resulting damages."

Williams mortgage, placed upon Whitehead the highest duty of probity in his dealings with Williams. In *McBride* v. *Campredon,* 24 N. M. 323, 171 Pac. 140, the Supreme Court of New Mexico, adopting the rule of this Court in *Villa* v. *Rodriguez,* 12 Wall. 323, held that the legal principles to be applied when testing the validity of a conveyance by a mortgagor to a mortgagee of his equity of redemption are nearly as stern as those governing the sale of trust property by a beneficiary to a trustee. For such a conveyance by a mortgagor to be valid, it must be shown that the mortgagor was afforded fair and frank treatment; that he was paid what the property was worth; that undue influence was not exercised upon him; and that the purchaser of the equity took no advantage of the fears and poverty of the mortgagor. When speaking of just such a transaction as this case presents, the highest court of New Mexico has said with respect to a mortgagee

> " '. . . Any indirection or obliquity of conduct is fatal to his title.' " *McBride* v. *Campredon,* 24 N. M. at 330, 171 Pac. at 142.

It is conceded that Whitehead stands in the shoes of the mortgagee (App. 14); he has no shoes of his own. Since the conduct of Whitehead as revealed in this record is one long march of obliquity, the decision of the court of appeals clearly constitutes a misapplication of both the letter and spirit of the law of the State of New Mexico.

B. Excepting those decisions directly reviewable in this Court, courts of appeals shall pass upon "appeals from all final decisions of the district courts of the United States." 28 U. S. C. § 1291. A duty implicit in performance of that appellate function is judicial conduct evidencing a certain

minimum of judicial care and rectitude. It is the duty of this Court to maintain that minimum level of performance by the courts of appeals. U. S. Sup. Ct. Rev. Rule 19 (1) (b), 28 U. S. C.

Petitioners submit that the decision in this case reflects such a departure from an acceptable appellate performance by a court of appeals as to require exercise by this Court of its supervisory power.

Not only has the court below made incorrect application of the law of New Mexico to those facts of the case which it cared to note, but, more important, it has shown itself to be unaware of, or unwilling to treat, two of the three alleged frauds that were brought to it for review. Thus, as was noted above, the court of appeals, while recognizing petitioners' allegations and proof that Whitehead had misrepresented McKinney as a relative of the mortgagee, concluded that (App. 11)

> "This is the only fraud the plaintiffs relied upon in their pleadings."

That is patently incorrect, as even a casual reference to the amended complaint will show (R. 57-58). Petitioners there clearly alleged (R. 57-58) and the district court found (App. 57-59) that Whitehead, in addition, had fraudulently misrepresented

> (a) that Williams would be afforded a first preferential right to recover his homestead at any time before its sale by the mortgagee; and
>
> (b) that the foreclosure suit against Williams would be finally dismissed, his note returned and the mortgage released with an end to all liability in Williams.

Certainly, it cannot be contended that those allegations, and the proof that supports them, were accorded an even acceptable minimum of consideration on review by the court below.

Petitioners have been shorn of their district court judgment by a decision which shows on its face either broad lack of familiarity with the case or an indifference to the issues which it posed. Where a court of appeals makes a gross or obvious error in performing its appellate function, it is appropriate for this Court to grant certiorari, summarily reversing the case upon the petition. *Cf. Bates* v. *United States,* 348 U. S. 966; *Simon* v. *United States,* 348 U. S. 967.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the judgment below summarily reversed.

Respectfully submitted,

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April 10, 1956

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APPENDIX

United States Court of Appeals

FOR THE TENTH CIRCUIT

PACIFIC ROYALTY COMPANY, a corporation, *Appellant,* v. CARL H. WILLIAMS; JOHN W. WILLIAMS; MRS. JOHN A. CLINE, JR.; JOHN A. CLINE, JR.; MRS. F. S. HOLLEBEKE; F. S. HOLLEBEKE; PAUL EUGENE WILLIAMS, JR.; LOTTIE MAY TREAS; ROBERT M. TREAS; BYRON LESLIE WILLIAMS; MARVIN LESTER WILLIAMS; RUBY LEONA WILLIAMS; JESSIE R. WILLIAMS and EDITH LILLIAN WILLIAMS, single, who is incompetent and who brings this suit by her next friend, CARL H. WILLIAMS, *Appellees,* JOHNSTONE BATES and WILLIAM RUFUS BATES, *Cross-Appellants,* v. PACIFIC ROYALTY COMPANY, a corporation, *Cross-Appellee.*	Docket Nos. 4827, 4828

Before MURRAH and PICKETT, Circuit Judges, and SAVAGE, District Judge.

PICKETT, Circuit Judge.

The plaintiffs, who are the heirs at law of Lester L. Williams and Gertrude A. Bates, have joined together in

this action to quiet title to the minerals underlying 320 acres of land in Lea County, New Mexico, and alternatively to establish a trust in the minerals, to procure an equitable accounting, and to rescind the deed through which the appellant Pacific Royalty Company claims the minerals. In 1919, Lester L. Williams received a patent on a homestead entry to the land in question, and almost immediately thereafter he mortgaged it to the F. B. Collins Investment Company to secure an indebtedness of $900.00. This mortgage was thereafter assigned to Gertrude A. Bates, who resided in the State of Michigan. Williams then sold the land to William C. Stoneman but later it was deeded back to Williams. The questions in this case rise from the transactions surrounding the collection of the note and mortgage beginning in 1926.

During that year the Williams mortgage was delinquent and it was forwarded to Union Mortgage Company of Dallas, Texas, a corporation wholly owned and operated by J. E. Whitehead, an attorney, for the purpose of collection. The Union Mortgage Company handled real estate mortgages, including the servicing and collection of mortgages owned by others. After foreclosure proceedings had been instituted on the Williams mortgage, Whitehead obtained a deed from Williams and his wife in which C. H. McKinney was named as grantee. Whitehead, using a deed which had theretofore been signed in blank by McKinney and his wife, conveyed the lands to a third person and reserved the mineral rights. By the same method the mineral rights were conveyed to the defendant Pacific Royalty Company, which was another corporation owned by Whitehead. The Williams heirs contend that the deed to McKinney was void because of fraud by Whitehead and because there was no delivery and acceptance of the deed by McKinney. The claim of the Bates heirs is based upon the trust relationship that existed because of Whitehead's position as an attorney

for Bates in collecting the note and mortgage. The Williams heirs and the Bates heirs through a cross-agreement and transfer, each claim an undivided interest in any recovery.

Pacific appeals from an adverse judgment quieting title to the minerals in the Williams heirs, granting them an accounting for monies received from the minerals, and denying Pacific's cross-action to quiet its title in the minerals. The Bates heirs cross-appeal from a judgment denying them any recovery. The trial court reserved decision as to the right of the Bates heirs to participate in the Williams' recovery under their cross-conveyance.

For a determination of the questions presented, a detailed statement of the facts is necessary. At the time of the trial, all of the parties, except McKinney, who had anything to do with the transactions were dead. The files of the executor of the Bates estate and of the brokers who serviced the mortgage were not available. What actually happened is difficult to determine, and it must be obtained from somewhat fragmentary correspondence and documents, most of which were obtained from Whitehead's files. A. W. Knapp & Co. of Detroit, Michigan, was a mortgage broker and it had sold the Williams mortgage to Mrs. Bates under an agreement to service it and in case of default to substitute another mortgage in good standing. After the death of Mrs. Bates, her executor, Bankers Trust Company of Flint, Michigan, and its successors, forwarded the mortgage to A. W. Knapp & Co.[1] for servicing. Knapp had an arrangement with Union Mortgage Company under which it referred defaulted mortgages covering lands in that area for collection, adjustment, or for the substitution of new

[1]A. W. Knapp & Co. was a trade name under which A. W. Knapp did business as a broker of first mortgages. He was a correspondent of Union Mortgage Company and brokered its loans. All defaulting mortgages were referred to Union Mortgage Co. for collection, adjustment, or for the substitution of a new mortgage in good standing. At one time, Union was handling as many as three thousand mortgages.

mortgages in good standing. The executor did not know that Knapp would forward the loan to Union for collection. It was understood between Knapp and Union that the mortgagee would be satisfied with a return of the principal and interest due on the mortgage, and that Union might make a profit for itself in handling transactions of this nature over and above the regular collection charges,[2] including attorney fees for Whitehead.

Union or Whitehead had no direct connection or dealings with the Bates Estate, but handled the matter for Knapp under the existing arrangement.

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[2]Upon this subject the court made these findings:

"That from correspondence passing between Knapp & Company and Whitehead it appears Knapp & Company wasn't adverse to Whitehead making a personal profit out of his various transactions in connection with mortgages transmitted to him by Knapp & Company.

* * * *

"From the fragments of correspondence available at this late date, there appeared clear indications that Whitehead may have been authorized to act as he did in connection with the Williams land.

* * * *

"Other indications point to the possibility that Whitehead might have had full authority to deal with the Williams loan and the Williams land as he deemed best, including the making of a personal profit for himself, provided, of course, collection of principal and interest was made for the estate. The possibility appears so evident, a finding that Whitehead and/or Union Mortgage Company exceeded the authority granted, or defrauded, the Bates Estate cannot be made after more than twenty years delay in asserting wrongdoing.

* * * *

"There are other letters mentioning the Williams loan. While none of them may show conclusive authority in Whitehead to deal with the Williams land as he did, nevertheless they do show rather clearly that the trustees of the Bates Estate were never interested in the Williams land itself. So far as the evidence reveals, they never inquired about the land, how it was held, nor anything in connection with the real estate itself. It is evident that the trustees of the estate were interested solely in collecting the principal and interest on the loan."

Upon receipt of the Williams' mortgage for collection, Whitehead was at first unable to find Williams, and he instituted a foreclosure action. In the meantime, Whitehead located Williams and the correspondence which followed provided the basis of fraud upon which the trial court relied to cancel the deed executed by Williams and his wife. Whitehead wrote to Williams requesting that he sign a waiver of summons in order to save the cost of making service. The waiver of summons was executed and returned to Whitehead, but the enclosure letter is missing. Whitehead, upon receipt of the waiver, wrote Williams and stated that he had hoped Williams would be able to redeem his farm. The Whitehead letter indicates that Williams had advised that he was not in a position to take care of the obligation. Whitehead suggested that farm lands were not selling well, that this particular place would not bring one half of the amount against it if sold "under the hammer". He enclosed a deed with a request that Williams and his wife execute it and return it to him. He stated that this would be the best way out for all concerned, and would save the cost of foreclosure and a deficiency judgment against Williams. The grantee named in the deed was C. H. McKinney, a tenant of Whitehead. Before executing the deed, Williams wrote to Whitehead and asked who McKinney was and what his interest was in the land. He also inquired if he would be given an opportunity to redeem. Upon receipt of this letter, Whitehead wrote explaining that the mortgage belonged to the estate of Gertrude A. Bates, and that the heirs did not want to get the title to the land involved with the estate. "For that reason, we are having the deed made to Mr. McKinney, a relative, who will hold it for the benefit of this Estate. The land will be accepted in full settlement of your obligation, and if you desire you may redeem the property or buy it back, this next fall." Immediately thereafter Williams wrote Whitehead and inquired if McKinney could get a release of the coupons that the mortgagee held against him.

He stated that the last coupons which he had paid had not been returned.[3]

Williams and his wife executed the deed on December 11, 1926, and it was recorded on December 17, 1926. There is nothing in the record to indicate how it came into Whitehead's possession. The foreclosure action was dismissed without prejudice. The record does not disclose whether the original note was delivered to Williams but it may have been. In 1930, when Union was making a settlement with the Bates Estate, the original note could not be found and Whitehead wrote to Williams and asked if the note had been delivered to him.[4] It was never found. After receipt of the deed from Williams, Union undertook to sell the property and reserve the mineral rights. This, it was able to do by 1930, and it obtained more than enough to pay the note, together with interest. The sum over and above the amount due was retained by Union pursuant to its understanding with Knapp.

Whitehead's arrangement with McKinney was unusual. The latter was known to Whitehead only through an agent named Locke. All negotiations and conversations with McKinney in 1926 on behalf of Whitehead were by Locke, who is deceased. In addition to being a lawyer, Whitehead apparently was a speculator in real estate and evidently was having financial troubles. Several tracts of land were to be conveyed to McKinney to protect Whitehead against civil judgments. McKinney executed a number of deeds in blank for the purpose of reconveying the same to Whitehead or his designee and delivered them to Locke. McKinney had no knowledge of the particular lands which were to be placed

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[3]Attached to the note given by Williams and his wife and secured by the mortgage in question were twenty interest coupons of $67.00 each. Whitehead wrote to Williams that he had in his possession the original note and mortgage and would deliver them when he got the deed, and stated that this would end Williams' liability. He also stated that the foreclosure action would be dismissed.

[4]Williams had died in 1929 and this letter was returned unclaimed.

in his name. He claimed no interest in any of the lands, admitted that he was holding them for Whitehead, and testified that he had agreed to act as Whitehead's dummy or strawman. He knew that sooner or later Whitehead would divest him of the title to the lands in his name by filling in and completing the blank deeds. He testified he had no objections to Whitehead's actions in that respect. He had no knowledge of the Williams' transaction, and the deed was not delivered to him. The Williams land was conveyed to Pacific Royalty Company by warranty deed dated about a month before the Williams deed came into Whitehead's possession. This deed was not recorded until 1948.[5] However, a deed acknowledged March 28, 1927, and recorded April 2, 1927, showing McKinney to be a single man, conveyed the mineral rights to that land to Pacific Royalty Company. This deed was acknowledged before Lura G. Wood, a Notary Public in Tulsa, Oklahoma. McKinney admitted his signature and testified that he did not know the notary and that he had never been in Tulsa. After Whitehead settled with the representatives of the Bates Estate in 1930, nothing further was heard from either Williams or Bates until 1949.

In that year, it appeared that this land was valuable because of the possibility that it contained substantial quantities of oil and gas. Representatives of the Shell Oil Company sought to lease it from Whitehead. The terms finally agreed upon included a cash bonus of $96,000, a $320,000 payment from production, and the usual one-eighth royalty interest. However, Shell was not satisfied with the title. Whitehead located McKinney and requested that he execute

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[5]An explanation of this late filing may be that one of McKinney's blank deeds was filled in a short time before filing. The mineral deed to Pacific was signed by McKinney as a single man. Objection had been made to the deed because not signed by McKinney's wife. Whitehead had been unable to locate McKinney to obtain a correction deed. In all probability, only Whitehead knew the real facts surrounding the completion of this deed.

a correction mineral deed because his wife had not signed the original instrument. The correction deed was obtained from McKinney upon the payment of a consideration.

Some time thereafter, W. H. Gilmore investigated the matter and concluded that the Bates heirs had a claim to the mineral rights. He purchased whatever claims they had for $1,000, and armed with this conveyance, instituted an action in the State Court of New Mexico asserting the Bates' claim. The case was removed to and tried in the United States District Court of New Mexico. After the issues were drawn and the case was ready for trial, Gilmore decided that he could not prevail. It was then stipulated that his action should be dismissed with prejudice, and a judgment was entered on a counterclaim quieting the title to the mineral rights in Pacific Royalty. Shortly thereafter, one of the attorneys for the plaintiffs in the instant action made an extensive investigation, including the records in the Gilmore Case, and concluded that either the Bates heirs or the Williams heirs owned the mineral rights to the lands. After discussions with this attorney, the Bates heirs purchased a reconveyance of their rights from Gilmore for $10.00, and $3,000.00 if the litigation was successful. The Williams heirs and the Bates heirs pooled their interests and entered into a contract with the attorney who was to receive fifty percent of the recovery. The Bates heirs and the Williams heirs by cross-conveyances were to divide the balance.

The interests of the two sets of heirs are in direct conflict. For the Williams heirs to prevail, we must conclude that the transfer from Williams was void and that title never passed to McKinney, Whitehead, or Pacific Royalty. If the Bates heirs are to recover, it must be established that Whitehead, as attorney for Mrs. Bates, obtained title and held it in trust for her. The trial court did not consider the cross-transfer, and neither shall we.

The defendant first contends that the trial court erred in not sustaining its plea of laches. The court found that the

Williams heirs "had no knowledge of the fraud which had been practiced upon their father, and mother, and had no reason to know the same, and were entirely ignorant of it until a very short time before the filing of the present suit. * * * They exercised all the reasonable care and diligence which could have been expected or required of persons in their circumstances and conditions of life. Without more knowledge than they possessed or should have possessed, it must be found that they did act with reasonable diligence, and there was no discovery of the fraud by them or any of them until just prior to the filing of this suit." It was also found that Lester L. Williams and his wife did not know of the fraud during their lifetime. From these findings the court concluded that the Williams heirs were "entitled to rescind and to have the deed executed by their father and mother to McKinney cancelled and held to be null and void."

The question of laches is generally addressed to the sound discretion of the trial judge. Potash Company of America v. International Minerals and Chemical Corporation, 10 Cir., 213 F.2d 153. Although it is a close question, we do not think the record shows an abuse of discretion in denying the plea of laches as to the Williams' claims or that the conclusion of the trial court is clearly erroneous.

This brings us to the question of whether there was a material misrepresentation by Whitehead which induced the execution and the delivery of the deed and which would constitute actionable fraud. In holding that the deed did not pass title to Whitehead or Pacific Royalty, the trial court found "that the representations made to Williams that C. H. McKinney was a relative of Gertrude Bates and that he would hold the Williams land for the benefit of the Bates estate were false and untrue. They were made by Whitehead with the intention to deceive Williams and to induce Williams to execute a deed to the land under the belief

that McKinney was a relative of Gertrude Bates and that McKinney would hold the land for the benefit of the Bates Estate, and, also, that he, Williams, would be released from all liability. I find that Whitehead made such false and fraudulent representations knowingly to mislead and deceive Williams." The court held that a grantor has the right to know his grantee and that "any representation as to the grantee and the capacity in which he is to receive title is so material it cannot be rejected as being immaterial and of no consequence." This is not an accurate statement of the law.

The essential elements of actionable fraud are a false representation of a material fact, knowledge of its falsity when made, intent to deceive, and reliance thereon with resulting damages. 17 Words and Phrases, Fraud, p. 522; 37 C.J.S., Fraud, § 3; Southern Development Co. of Nevada v. Silva, 125 U.S. 247; Davis v. Wilson, 8 Cir., 276 F. 672; Pace v. Parrish,—Utah—, 247 P.2d 273; Wishnick v. Frye, 111 Cal.App.2d 926; 245 P.2d 532; Thompson v. Teel, 204 Okl. 105, 227 P.2d 395; Koen v. Cavanagh, 70 Ariz. 389, 222 P.2d 630. Fraud will never be presumed and will be sustained only upon evidence that is clear and convincing. 37 C.J.S., Fraud, § 114; Southern Development Company v. Silva, supra; Union Railroad Co. v. Dull, 124 U.S. 173; Davis v. C. I. R., 10 Cir., 184 F.2d 86; Greene v. Esquibel, 58 N.Mex. 429, 272 P.2d 330; Jones v. Citizens Bank of Clovis, 58 N.Mex. 48, 265 P.2d 366; Frear v. Roberts, 51 N.Mex. 137, 179 P.2d 998; Consolidated Placers, Inc., v. Grant, 48 N.Mex. 340, 151 P.2d 48. The burden is even greater in cases where the person to whom the fraud is attributed is dead. New v. H. E. Harmon Coal Corp., 181 Va. 627, 26 S.E.2d 39; Grigg v. Hanna, 283 Mich. 443, 278 N.W. 125; Prevost v. Gratz, 6 Wheat 481, 496. Fraud, to be actionable, must relate to a present or pre-existing fact, that is, fraud may not

be predicated upon representation as to matters which are to happen in the future. 23 Am.Jur., Fraud and Deceit, Sec. 35, 38; 1 Black on Recision, p. 254; United States v. Stanolind Crude Oil Purchasing Co., 10 Cir., 113 F.2d 194, 201; Werner v. City of Albuquerque, 55 N.Mex. 189, 229 P.2d 688; Witt v. Cuenod, 9 N.M. 143, 50 P. 328. This rule does not apply to cases where there was a promise of future action made to accomplish the fraud and with no intention of performing. Werner v. Alburqueque, supra. The only false representation of an existing or pre-existing fact which Whitehead made to Williams was in his letter of November 18, 1926, wherein he wrote Williams that title was being taken in McKinney to prevent the title from becoming involved in the Bates Estate, and that McKinney was a relative who would hold it for the benefit of the estate. This is the only fraud the plaintiffs relied upon in their pleadings. Prior to this statement, Whitehead had advised Williams that if he would surrender title to the property, the foreclosure action would be dismissed and there would be no deficiency judgment against him. In his November 18th letter, he advised Williams that it would be better for him to deed the property over, rather than to let the suit continue and have the property sold under foreclosure with the possibility of a deficiency judgment. He stated, "* * * if we can get the title perfected we can then dismiss this suit and that will end the matter." Following this letter, Williams wrote to Whitehead and asked him if McKinney could get a release of the interest coupons which the mortgagor held, stating that the last coupons which he had paid had not been sent to him. Whitehead replied that he had the original note and mortgage in his possession and that he would deliver them to Williams when he received the Williams deed and another from the Stonemans. The Williams deed to McKinney was recorded on December 17, 1926. The con-

sideration stated was $1.00 and the assumption of the $900.00 Williams mortgage.

Concededly, the statement that McKinney was a relative of Mrs. Bates was false, but a fair analysis of the correspondence indicates that this was of no particular concern to Williams. It is evident that he was willing to convey the land to discharge his obligation under the note and mortgage. It is also quite evident that his inquiry about McKinney was to find out if he could obtain from him a full release of that obligation, including the interest coupons. The record is also clear that Williams received the consideration for which he bargained, that is, a complete release and satisfaction of his obligation under the note and mortgage. Consequently any promise of Whitehead for future action which induced him to execute the deed was performed. The foreclosure suit was dismissed. Whether the note was delivered to McKinney upon the delivery of the deed or thereafter, is not disclosed. The mortgage was released in 1930 after a sale of the property had been consummated, and no demand for further payment was ever made upon Williams or his heirs. It is not now contended that there is any liability on the note and mortgage. Twenty-six years after the transfer, at a time when the value of the property had increased from about Nine Hundred Dollars to One Million Dollars, they seek to set aside the conveyance because there was a misrepresentation of the grantee's identity. This is actionable fraud only when it is shown that the grantor would not have executed the conveyance had the true identity of the grantee been known. Walker v. Galt, 5 Cir., 171 F.2d 613, certiorari denied 336 U.S. 925; Robinson v. Richards, 209 Mass. 295, 95 N.E. 790; Tollet v. Montgomery Real Estate & Ins. Co., 238 Ala. 617, 193 So. 127; Williams v. Kerr, 152 Pa. 560, 25 Atl. 618; Hood v. Cline, 35 Wash.2d 192, 212 P.2d 110; Craig v. Shea, 45 Cal.App. 351, 188 P. 73; Cohn v.

Knabb, 105 Wash. 363, 177 Pac. 794; Cole v. Hunter Tract Improvement Co., 61 Wash. 365, 112 Pac. 368; Wilkirson v. Thompson, Tex.Civ.App., 104 S.W.2d 1115; Hall v. Bollen, 148 Ky. 20, 145 S. W. 1136; Anno. 6 A.L.R.2d 812. The mere proof of misrepresentation as to a grantee is not sufficient to sustain an action for fraud. There was no evidence that Williams would not have executed the deed had he known the true identity of McKinney or that he relied upon the misrepresentation with resulting damages.

The trial judge concluded that "title to the Williams land never passed from Williams and remains today in his heirs". This conclusion is based upon a finding that the deed was never delivered to or accepted by McKinney. We think the finding and conclusion are contrary to the law and the evidence. The only evidence relating to the agreement between McKinney and Locke, representing Whitehead, is that of McKinney. Locke and Whitehead are dead. McKinney related his understanding of transactions which occurred more than twenty-six years before and of which he had no reason to recall until 1949. It seems rather clear from McKinney's testimony that he knew Whitehead was going to convey the title to some lands to him. He did not know or care what particular lands they were. He permitted it to be done strictly as a favor to Whitehead who was threatened with civil judgments. He claimed no interest in the lands. He executed the deeds in blank for the purpose of providing a means whereby Whitehead could divest title from him. He was what is commonly known as a "strawman", that is, one who holds a naked legal title to property for the benefit of another. Collins v. Curtain, 325 Mass. 123, 89 N.E.2d 211. He knew that the blank deeds to accomplish this purpose would have to be filled in at a later date, and he understood that Whitehead would use them for that purpose as he saw fit. This was

satisfactory to McKinney. If McKinney's testimony is to be considered at all, it must be construed to show that he authorized Whitehead to act for him in filling in and completing the deeds to divest title from him. The delivery of the signed blank deeds could have been for no other purpose. McKinney's position was purely nominal and the deeds conveyed no real interest in the lands to him. He was in fact Whitehead, and under the circumstances, delivery and acceptance by Whitehead of the Williams deed constituted a delivery and acceptance by McKinney. A good delivery of a deed may be made to an agent or a third party on behalf of a grantee if it is made without any reservation to recall it. Arias v. Springer, 42 N.M. 350, 78 P.2d 153; 16 Am.Jur. Deeds, Sec. 127. There is no reason why delivery to the real principal should not be as effective as delivery to his agent. There is no evidence that Williams did not deliver the deed to Whitehead with intent to completely divest himself of title to the land.

Even if there were a question of delivery and acceptance by McKinney, it was cured in 1949 when he received $1,500.00 to execute a correction deed. This in itself is satisfactory evidence of a delivery of the first deed and a ratification thereof. Gould v. Day, 94 U.S. 405; Reserve Petroleum Co. v. Hodge, 147 Tex. 115, 213 S.W. 2d 456; Anno. 7 A.L.R.2d 294.

When Whitehead obtained the Williams deed he did so as a representative of the Bates Estate. So long as the mortgage remained unpaid he held the title for the benefit of the Bates Estate, or at least subject to the lien of the mortgage. Under his arrangement with Knapp, acquiesced in by Bates' executor,[6] Union was authorized to handle the transaction as it did and when the mortgage was paid

[6]There is ample evidence that Knapp agreed that Union could handle the mortgages so that it could make more than the customary fee. The trust office of the executor bank stated that it did not desire to acquire title to any land in New Mexico and that Knapp and Union

in full, title to the land vested in Union or its transferee free from any obligation of the mortgage. This would appear to explain the reason why the Williams deed was made subject to the mortgage. Williams executed the deed subject to the mortgage, thereby indicating that he knew that it was to remain of record for some reason.

Furthermore, we fail to find any equities in favor of the Williams heirs. As hereinbefore stated, their predecessor executed the deed for the purpose of conveying his property in satisfaction of an existing mortgage. Payment of a pre-existing debt is a valuable and adequate consideration for the transfer of property. Consolidated Placers, Inc., v. Grant, supra. Williams received this consideration, and everything for which he bargained. Twenty-six years later his heirs desire to keep the consideration for the bargain and seek to obtain title to the lands. Conceding that Whitehead made false representations and manipulated the title to the minerals underlying the land into his wholly owned company without cost to him, his acts do not create any equities in favor of the Williams heirs. Generally speaking, equity will not aid one who cannot establish an equity superior to that of the holder of the legal title to the subject matter, and a court of equity will not intervene where there are equal equities or where there are no equities. 30 C.J.S., Equity, § 110; Garnett v. Jenkins, 33 U.S. 75; Taggart v. Keim, 3 Cir., 103 F.2d 194; Dunken v. Guess, 40 N.Mex. 156, 56 P.2d 1123; Monaghan v. Barnes, 48 Ariz. 213, 61 P.2d 158; Friel v. Alewel, 318 Mo. 1, 298 S.W. 762. Pacific Royalty had held legal title to the minerals in question for over twenty-six years before this action

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were authorized to handle the Williams mortgage as they saw fit so long as they obtained and remitted to the bank the principal and interest, less expenses. All the bank wanted was the amount due, no more, no less.

was brought. This legal title should not be disturbed by a court of equity if Williams' claim is doubtful or if the equity scale is nearly balanced. Garnett v. Jenkins, supra; Dunken v. Guess, supra; Monaghan v. Barnes, supra; Friel v. Alewell, supra. Williams received the consideration for which he bargained and his heirs should not at this late date be permitted to backtrack and set aside the conveyance. There is no indication here that the consideration was not adequate and sufficient and under the circumstances a court of equity could have required a conveyance from Williams to the proper party. In this case, that party would have been either Union Mortgage Company, Whitehead, Pacific Royalty Company or the Bates heirs. 81 C.J.S., Specific Performance, §§ 39, 62; Henry Keep Home v. Moore, 198 Okl. 198, 176 P.2d 1016; In re Gabler's Estate, 265 Wis. 31, 60 N.W.2d 342; Garsick v. Dehner, 145 Neb. 73, 15 N.W.2d 235; Bennett v. Copeland, 149 Tex. 474, 235 S.W.2d 605; Hamilton v. Harkins, 302 Ky. 340, 194 S.W.2d 646.

In denying any relief to the Bates heirs, the trial court held that the course of conduct of Union and Whitehead in handling the Bates mortgage was authorized by an arrangement with Knapp and was acquiesced in by the executor of the Bates Estate. While the court indicated in its findings that the Bates claim was stale and the plea of laches was good, it did not rely upon the finding in rendering judgment, nor did it pass upon the plea of res adjudicata. As we have heretofore stated, the evidence sustains the court's finding as to the authority of Union and Whitehead. All the evidence that is available shows that the Williams mortgage was forwarded by the Bates Estate to Knapp for servicing under the terms of a written agreement existing between them. In turn, the mortgage was forwarded to Union for servicing in accordance with an

understanding between them. This servicing included the replacement of that mortgage with a new mortgage in good standing. The Bates heirs rejected an offer to substitute a mortgage in good standing for the Williams mortgage. It is impossible to ascertain with any degree of certainty the conditions upon which the mortgage was delivered to Mrs. Bates or the negotiations or understandings between Knapp and the executor bank. The files of each have been destroyed. The trust officer of the bank stated that the executor had no interest in acquiring title to any lands in New Mexico or Texas; that all it wanted was the money due upon the note and mortgage; and that Knapp and Union, including Whitehead, could handle the matter as they saw fit so long as the amount due on the mortgage, less expenses, was paid. When Union or Whitehead, obtained and delivered to the executor the amount due upon the note and mortgage, the obligation was fulfilled. Any amount, which would include title to the mineral rights, over and above this amount could be retained. It is immaterial that the title may have been held in trust by McKinney, Whitehead or Pacific Royalty or that the land was subject to the lien of the mortgage until the amount due was paid to the Bates Estate. When the amount was paid, any trust relationship which might have existed, disappeared. The findings of the trial court are fully substantiated by the evidence.

Furthermore, the judgment in the Gilmore Case was binding upon the Bates heirs. Gilmore, for a consideration of $1,000.00 obtained a deed from the Bates heirs to the legal and equitable title of "all claims, demands, rights to accounting, choses in action, equities, and causes of action of whatsoever kind and character" which the Bates heirs had in the mineral rights in question. This deed was the sole basis for the claim asserted by Gilmore in an action against Pacific Royalty. The same grounds for recovery

were alleged in that action as were alleged in the instant action. In that action, Gilmore stood in the shoes of the Bates heirs. It was there adjudicated that Gilmore had no rights in the minerals and title was quieted in Pacific Royalty as against him.

Thereafter in preparation for the filing of this action, the Bates heirs obtained a reconveyance from Gilmore and his wife. The consideration was $10.00, and an additional sum of $3,000.00 if the Bates heirs made a recovery on the claim. Having conveyed all of their interest in the property to Gilmore, the Bates heirs must rely upon the reconveyance to sustain their position in this case. They are therefore privies of Gilmore and bound by the judgment in the former action. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381; Box v. Rundell, 10 Cir., 179 F.2d 626; Clegg v. United States, 10 Cir., 112 F.2d 886; Frost v. Bankers Commercial Corp., 2 Cir., 194 F.2d 505; United States v. Willard Tablet Co., 7 Cir., 141 F.2d 141.

There is no merit to the contention that the District Court was without jurisdiction in the Gilmore Case because of a lack of a diversity of citizenship between the parties. Diversity was alleged and the record on its face does not show a lack of diversity of citizenship between the parties. The contention of the Bates heirs amounts to a collateral attack upon the Gilmore judgment. Unless the record in that case affirmatively shows that the court did not have jurisdiction, the judgment must stand. New Orleans v. Fisher, 180 U.S. 185; Evers v. Watson, 156 U.S. 527; Dowell v. Applegate, 152 U.S. 327; Lacassagne v. Chapuis, 144 U.S. 119; Rubens v. Ellis, 5 Cir., 202 F.2d 415; Nye v. United States, 4 Cir., 137 F.2d 73; Connett v. City of Jerseyville, 7 Cir., 125 F.2d 121. The fact that the judgment in the Gilmore Case was entered under a stipulation of the parties is immaterial. 2 Freeman on Judgments, (5th Ed.), Sec. 757; National Rejectors, Inc., v. A. B. T. Mfg.

Corp., 7 Cir., 184 F.2d 612, cert. den. 340 U.S. 912; Tillman v. National City Bank of New York, 2 Cir., 118 F.2d 631, cert. den. 314 U.S. 650; Pick Mfg. Co. v. General Motors Corp., 7 Cir., 80 F.2d 639. An examination of the entire record on the cross-appeal discloses no reversible errors on the part of the trial judge.

Judgment in Number 4827 is reversed with instructions to enter judgment quieting title to the mineral rights in the Pacific Royalty Company.

Judgment in the cross-appeal Number 4828 is affirmed.

District Court of the United States

DISTRICT OF NEW MEXICO

CARL H. WILLIAMS, et al,
Plaintiffs,

v.

PACIFIC ROYALTY COMPANY,
Defendant.

No. 2094
CIVIL

MEMORANDUM

Inasmuch as counsel are fully advised as to all the facts and this is not a formal opinion to be published, I shall recite only such facts as may seem pertinent to the particular matter discussed. However, all the facts adduced at the hearing have been carefully weighed and fully considered in arriving at the decision which has been reached.

I will first discuss and dispose of the claim made by the plaintiffs who are referred to as the Bates heirs. The Bates' claim rests upon transactions occurring more than twenty years ago. A note and mortgage executed by Lester L. Williams and covering the East Half of Section 10 in Township 15 South, of Range 37 East, Lea County, New Mexico had been acquired by Gertrude Bates, who subsequently died, and the note and mortgage, with other assets, passed to the trustees of her estate. The Bankers Trust Company of Flint, Michigan, acted as trustee at all times material to this case until it was succeeded by the Union Industrial Trust Company. The Bankers Trust Company, trustee, which will hereinafter be referred to as Bankers Trust, forwarded the Williams paper to the Union Mortgage Company of Dallas, Texas. J. E. Whitehead was the

principal stockholder; in fact, for all practical purposes, the sole owner of the Union Mortgage Company. In October, 1926, Whitehead as attorney filed suit to foreclose the Williams mortgage in the District Court of Lea County, New Mexico. By subsequent steps and proceedings unnecessary to relate now, the title to the Williams land was taken under a deed from Williams and wife, with one McKinney named as grantee. By various deeds of conveyance from McKinney, the defendant, Pacific Royalty Company, claims to be the owner at this time of all minerals, including oil and gas in and under the Williams tract. In recent years these mineral rights have become immensely valuable and are probably worth at this time somewhere in the neighborhood of a million dollars.

By reason of somewhat unusual procedure followed by Whitehead, the Bates heirs claim a constructive trust arose and they are the owners to oil and gas rights under the Williams land. They have asserted that ownership in this proceeding and ask equitable relief decreeing the creation of a trust estate, of which they are the beneficiaries.

The evidence of fraud on the part of Whitehead, which is the basis of the Bates' claim, is not of that clear and convincing nature required to authorize the granting of equitable relief. From the fragments of correspondence available at this late date, there appeared clear indications that Whitehead may have been authorized to act as he did in connection with the Williams land.

Upon default of payment of Williams' mortgage the Bankers Trust had transmitted it to A. W. Knapp and Company, also of Flint, Michigan. This company carried on nearly all the correspondence with Union Mortgage Company and J. E. Whitehead. Apparently, A. W. Knapp Company specialized in first mortgages on lands throughout the country and looked after the collection and adjustment of claims arising under such mortgages for their clients. Such seems to have been the case in connection with the

Williams Loan. It is also apparent that similar transactions had been carried on between A. W. Knapp and Company, Union Mortgage Company and J. E. Whitehead as early as June 7, 1924. Knapp and Company wrote Union Mortgage Company in connection with other loans and said, "I think you are very sensible to make some money out of these notes, if you can, and you surely are entitled to it for the work you have rendered." Again indicating that Whitehead or Union Mortgage Company might rightfully make a personal profit from papers sent by Knapp and Company, that company wrote Union Mortgage Company on March 1, 1926, in part, as follows: "We have made a start with your loans and are willing to go ahead and push them, but we can't pay all expenses and make our salt on a two and one-half percent deal. Unless the valuations on these delinquents are all false, it would seem that they might be sold for much more than the amount against them, and a profit made in such sale,—but this is your affair." Neither of the above letters referred directly to the Williams loan, but they do indicate a course of dealing with loans forwarded to Union Mortgage Company by Knapp and Company, of which the Williams loan was one.

That Whitehead did have rather general authority in connection with mortgages forwarded to Union Mortgage Company by Bankers Trust and through Knapp and Company is revealed by a letter from Knapp and Company to Union Mortgage Company in which instructions from Bankers Trust are quoted. That letter is as follows:

"June 1, 1926.

The Union Mortgage Company,
Dallas, Texas.

Gentlemen:— Re: O. J. Andrus

Bankers Trust Company write in response to your letter of the 24th as follows:

'In reply to your communication of May 27th, in which you forwarded to us a letter from J. E.

Whitehead, President of the Union Mortgage Company of Dallas, Texas, we wish to state that we wish you to handle these mortgages in accordance with your best judgment, as to our best advantage. We shall not accept any future interest payments on this mortgage until advised to do so.' Signed Bankers Trust Company.

This places the matter entirely in your hands and I certainly would push every one of these. You know we can exchange another loan upon payment or collection of any of Mrs. Bates' loans.

Please give particular attention to the Scott loan belonging to this same estate.

Respectfully yours,"

Signed "A. W. Knapp."

Other indications point to the possibility that Whitehead might have had full authority to deal with the Williams loan and the Williams land as he deemed best, including the making of a personal profit for himself, provided, of course, collection of principal and interest was made for the estate. This possibility appears so evident, a finding that Whitehead and/or Union Mortgage Company exceeded the authority granted, or defrauded, the Bates Estate cannot be made after more than twenty years delay in asserting wrongdoing. If such authority was never given to Whitehead or Union Mortgage Company, and if the Williams deed did create something in the nature of a trust, the Bates heirs are not now in position to assert the same.

I have mentioned the lapse of more than twenty years since these transactions occurred. During that period of time all files of the Bankers Trust, the Union Industrial Trust Company and A. W. Knapp and Company have been completely destroyed, lost or, in any event, are not now available. But, from the evidence which is available, nearly all of which comes from the files kept and preserved by Whitehead, it is certain that on at least one occasion White-

head advised the trustee that a deed to the Williams land had been taken. On July 29, 1929, the Union Mortgage Company addressed a letter to Union Industrial Trust Company concerning several loans. In that letter the Williams loan was specifically referred to in the following language:

> "We will ship you a new loan for Lester L. Williams, owned by Gertrude A. Bates, if you decide to accept the same. We obtained a deed from Lester L. Williams covering this tract of land and now we have possession of the land and have dismissed our foreclosure suit. If you do not want to take an exchange, we will continue to look after the land and dispose of it finally as best we can."

There are other letters mentioning the Williams loan. While none of them may show conclusive authority in Whitehead to deal with the Williams land as he did, nevertheless they do show rather clearly that the trustees of the Bates Estate were never interested in the Williams land itself. So far as the evidence reveals they never inquired about the land, how it was held, nor anything in connection with the real estate itself. It is evident that the trustees of the estate were interested solely in collecting the principal and interest on the loan. Finally in 1930, after Whitehead had sold the surface of the Williams land to Denton, a remittance was made by Whitehead to the Union Industrial Trust Company in accordance with an itemized statement he had previously rendered. In that statement, which appears in the record, Whitehead lists the principal and interest he calculated to be due on the loan and all charges he had made in connection with the collection. No where did he set forth anything concerning the sale price of the Williams land, nor did he in any way attempt to account for what had been received from such sale. It is now contended that this statement and the remittance made by Whitehead were incorrect and Whitehead failed to send some two or three hundred dollars actually due and owing under the Williams loan. But

the statement rendered by Whitehead was accepted by the trustee and settlement was made on the basis of that statement. So well pleased was the trustee with the final settlement of the Williams loan, a letter was written on August 6, 1930, addressed to the Union Mortgage Company: "Attention: J. E. Whitehead, Re: Lester L. Williams loan." In that letter it was said:

> "Replying to your letter of August 11th, we received remittance for the above mortgage as outlined in copy of letter this date to Lea County State Bank.
>
> We thank you for your kind attention to this matter."

This letter is signed by Union Industrial Trust Company.

If Whitehead misled the trustee and did not correctly account for what was actually owing on the Williams loan and to that extent defrauded the estate, the discovery of such wrongful action would have required only a mathematical calculation. The estate had all necessary information before it. Without question, the trustee, the Union Industrial Trust Company, must have had easily available expert financial advice, accountants and even legal talent at hand and available at all times. No contention was ever made by the trustee or by the estate in any way that the settlement made by Whitehead was not entirely satisfactory. It was accepted as a final settlement and as the end and conclusion of the whole matter.

After such a final settlement and a delay of twenty years, until files and records have been lost and destroyed, witnesses have died, and the principal actor, J. E. Whitehead, is dead, it is hardly possible for a court to determine all facts necessary to a just decision. These demands come too late. If they do not come within the doctrine of laches they are certainly stale.

The Bates heirs, plaintiffs in this action, are not without fault themselves. After the discovery of oil in the area, a

man named Gilmore who was examining the records in Lea County, became suspicious as to Whitehead's dealing with the Williams land. He contacted the two plaintiffs, the Bates brothers, and sought to purchase whatever interest they might have in the Williams land. The Bates heirs did not act immediately on Gilmore's offer. They sought advice and received some information concerning the status of the title. They were at least put upon notice that they might have rights in this extremely valuable tract of land, but after having obtained such information and with full opportunity to investigate and know exactly what rights they might actually have they accepted the offer made by Gilmore and sold and conveyed the Williams land to Gilmore for a total consideration of $1,000. By this sale the Bates heirs clearly evidenced an intention to and they did abandon any and all rights they might have had to all or any part of the Williams land. Their willingness to abandon, as well as their negligence in the execution of a solemn instrument of conveyance, is evidenced by the form of deed they executed when they conveyed the land to Gilmore. It was not a mere quit-claim deed or a release of possible rights which might exist in them. The deed is one of conveyance. It recites that for the consideration paid they "sold and conveyed" the Williams land to Gilmore. By this deed they exhibited a willingness to sell and convey that which they did not own. This form of conveyance, for the consideration expressed and received by the Bates heirs, does not appeal to the conscience of the Court. They sold their rights to the Williams land for $1,000. Although Gilmore afterwards reconveyed to them by a quit-claim deed, the intention of the Bates heirs to give up and abandon all rights to the Williams land is most apparent.

When parties sleep on their rights, when a great number of years have elapsed, when records are destroyed, when witnesses have died and when it is impossible for the Court to

determine just what the true facts in a case are and how a just decision should be made, equity is not inclined to grant relief. Vigilance and reasonable diligence are always required in equitable actions. Failure to be vigilant and failure to exercise reasonable diligence generally defeat the right to equitable relief. There are many cases sustaining this general statement. 30 C. J. S. Sec. 112, p. 521 and also the same volume and text at Sec. 119, p. 542. In New Mexico the general rule was announced in Consolidated Placers v. Grant, 48 N. M. 340, wherein the following statement appears:

> "It is only where it would be impossible for the trial court to arrive at a safe conclusion as to the truth of the matter in controversy and do justice between the parties, that the doctrine will be invoked."

So far as the claim of the Bates heirs is concerned, I am convinced that it is impossible for this court to arrive at a just conclusion as to the truth of the matter in controversy and do justice to the parties upon the meager facts which exist in this case, and especially in the light of the acquiescence by the trustees and the Bates heirs in all of Whitehead's doings over the long period of more than twenty years, without ever once asserting any right or claim to any relief. While much more could be, and possibly should be, said concerning the claims of the Bates heirs and the reasons which have prompted my decision, it is sufficient now to say that the relief prayed for on account of rights asserted by the Bates heirs will be denied.

The case of the Williams heirs is altogether different. Lester L. Williams, without question, was a poor man who had homesteaded a barren tract of land in Lea County, New Mexico. He was also a sick man. He died from a malignant disease in the year 1929, before final settlement of his loan had been made by Whitehead to the Bates Estate. No

bankers, lawyers or accountants were, I am sure, available to Williams. He dealt with the holder of his note and mortgage and through its representative, J. E. Whitehead, on an altogether different basis than did the Bates Estate or the Bates heirs.

When the foreclosure suit was filed on October 20, 1926, Williams had moved to San Angelo, Texas. After some time he was located there by Whitehead. Whitehead immediately began to negotiate with Williams for the execution of a deed to the Lea County lands. In these negotiations Whitehead represented the land would not bring its actual value if sold "under the hammer" and that a deficiency judgment might be rendered against Williams. In exchange for a deed Whitehead promised the suit would be dismissed, no deficiency judgment would be taken, the note would be returned to Williams and the mortgage would be released. In line with these promises and assurances by Whitehead, a deed was sent to Williams for execution. Upon receipt of the deed and after examination of it, Williams wrote Whitehead as follows:

"San Angelo, Texas.
November, 1926.

Mr. Whitehead:

Dear Sir:

I received a letter containing a deed to be signed. I do not understand if I be correct. This deed is made to C. H. McKinney. Who and how does McKinney concern in this land?

If the Company could or would give me time to get in a position I would redeem my home.

Yours very truly,

L. L. Williams"

In making inquiry, although probably altogether ignorant of law, Williams was asking a perfectly proper legal question. Every grantor has the undoubted right to know his grantee and also the capacity in which the grantee is to receive title. To the Williams letter Whitehead answered as follows, under date of November 18, 1926:

"Lester L. Williams,
San Angelo, Texas.

Re: Bankers Trust Company
v. Savings Bank, Lester L. Williams, et al.

Dear Sir:

Your letter received, contents noted. The mortgage upon your land, Mr. Williams, belongs to the Estate of Gertrude A. Bates, now deceased. She died after she bought that mortgage and we did not want to get the title to the land involved in her estate, as that would make it hard to sell. It would make it necessary to sell it through the Probate Court, just as any other dead person's estate, and would be expensive and make an unsatisfactory and cumbersome title.

For that reason we are having the deed made to Mr. McKinney, a relative, who will hold it for the benefit of this estate. The land will be accepted in full settlement of your obligation and if you want to redeem this property at any time would be glad to hear from you, because this estate does not want the land and would be glad to sell it back to you at a very satisfactory price and on fair terms.

If you get in shape this next fall to buy the land back, write to me, for you can certainly buy it at any time before the estate sells it. And, as you know, New Mexico land is not going to sell fast.

Has Mr. Stoneman any interest in this land at this time? I will appreciate your further advice.

It would be better for you to deed it over rather than to let this suit go on because it would be sold

under the hammer and the deficiency judgment left against you, whereas under this arrangement, if we can get the title perfected, we can then dismiss this suit and that will end the matter.

Yours very truly,"

Even after receipt of the foregoing letter from Whitehead, Mr. Williams still sought further information, as he had a right to do. On November 23 he wrote Whitehead as follows:

"Dear Sir: J. E. Whitehead:

Received your letter stating that McKinney was related to the deceased. Can McKinney get or release coupons that company holds against First Parties?"

While the letter contains other statements not too material, it is apparent that Williams was much concerned about the capacity in which McKinney would act and the authority he would have. The reply to this last letter is not in evidence. It is not known what Whitehead answered, but he must have replied in a way that carried out his previous promises and assurances and also that McKinney would act for the benefit of the Bates Estate, for it was not long after that that Whitehead sent the deed to the County Clerk of Lea County to be recorded. Williams evidently had transmitted the deed to Whitehead after the receipt of an answer to his last letter. In all this it appears certain, and it may be concluded that they are known facts, that Williams executed the deed to McKinney upon the understanding and belief that McKinney was a relative and that he would hold it, the land, for the benefit of the Bates Estate. The delivery of the deed to Whitehead was made to Whitehead as attorney for the Bates Estate. He could have accepted it in no other capacity. Whitehead did dismiss the suit, but that dismissal was "without prejudice." He never returned the

note to Williams. It was not until 1930, after the death of Williams, that the mortgage was released. The money with which payment to the Bates Estate was made and the release of mortgage obtained came from the sale of the surface rights of the land to Denton. In justice to Whitehead it should be noted that although liability existed against Williams at all times until the final settlement was made in 1930, Whitehead never sought payment from Williams, and no deficiency judgment was taken. In a negative, roundabout and indirect way, Williams did receive the consideration promised by Whitehead, but not in his lifetime.

A decision in this case cannot be made without commenting on the grantee in the Williams deed. C. H. McKinney was a tenant farmer who had resided for a number of years on lands owned by Whitehead in Oklahoma. He is a man of little education, apparently a typical tenant farmer, without too much knowledge of business affairs. This is not said to his discredit, for, as a witness, McKinney made a most favorable impression. As his testimony was given he appeared to be a frank and honest man. He was believed by the Court.

Sometime before October 1926, McKinney was residing on a Whitehead farm near Roff, Oklahoma. This farm, with other lands owned by Whitehead, seemed to be managed and supervised by one Joe Locke. In the evening of a day before October 1926, at theMcKinney home near Roff, Joe Locke appeared with a number of blank deeds and some notes. He requested McKinney and wife to sign these deeds and notes, explaining that they, apparently meaning Whitehead and himself, feared judgments might be returned against Whitehead. They had or would convey certain lands to McKinney. This is about the substance of the explanation made to McKinney by Locke, according to McKinney's testimony. Obligingly McKinney signed the blank deeds and the notes. It is believed his wife joined

him in the execution of all deeds except one. The deeds so executed were entirely blank, none of the spaces appearing in the ordinary form of deed was filled out, either in writing or by typewriter. No grantees were named and the deeds contained no description of any property whatever. Even authority from McKinney to Locke to fill in the blank spaces is most vague. McKinney's testimony on this point is not clear. On direct and cross examination he admitted that he must have given, or rather that he "guessed" he gave Locke permission to fill in the blank spaces "else I would not have signed the deeds." It is quite apparent, however, that no express authority to fill in the blank spaces was given by McKinney. In all probability Locke simply had McKinney sign the deeds and little or nothing was said about filling them in later.

Whatever lands were contemplated or referred to by Locke at the time must have been lands which Whitehead owned or which, at least, were in his name. Otherwise there would have been no danger of judgments against Whitehead. Nothing related in the testimony of McKinney referred to any semblance of authority to deed lands never in Whitehead's name and not subject to judgment against Whitehead. Be that as it may, the deeds were executed and are mentioned here only because of the peculiar circumstances revealed in the evidence relating to deeds executed by McKinney to Pacific Royalty Company, covering the Williams land. One such deed appears to have been executed by McKinney and wife and dated October 16, 1926, before Whitehead had even filed suit against Williams. This deed describes the Williams land and names Pacific Royalty Company as grantee. An identical deed also appears, but it seems not to have been acknowledged, was not dated and, of course, was never filed of record. The first deed was acknowledged before Locke, or it appears to have been so acknowledged. It was withheld from record until the year 1948, more than twenty years later. A third deed was executed by C. H.

McKinney, described as a single man, conveying the Williams land to Pacific Royalty Company. McKinney's evidence concerning the acknowledgment of this deed is most interesting. The acknowledgment is supposed to have been taken before a notary public in Tulsa County, Oklahoma. McKinney testified that he was never in Tulsa County, Oklahoma, and never heard of the notary who was supposed to have taken his acknowledgment to that deed. But aside from the irregularities in the deeds, far more important facts appear in connection with all these deeds and McKinney's execution of them. McKinney testified positively and directly that he had never heard of the Williams deed and that he never knew of its existence. Possibly he learned of it in 1949 when a correction deed was sought from him. He knew nothing of the Lea County land and never knew that the deed made by Williams named him as grantee. Further, he never knew, and probably does not know to this date, that the deed from Williams imposed burdens upon him, McKinney.

The Williams deed recited that it was executed for a consideration of one dollar and the assumption of the mortgage indebtedness in the sum of $900. The assumption of this indebtedness was without question a burden imposed upon the grantee, McKinney. Further, the conditions under which the Williams deed was executed, that is that the grantee McKinney was to take and hold the property for the benefit of the Bates Estate, also imposed an additional burden upon McKinney to so hold the land for the benefit of the Bates Estate and, in effect, to be trustee for that estate. For title to be conveyed under a deed imposing burdens, such as the Williams deed imposed, it is absolutely essential that the grantee not only have actual delivery of the deed but that he accept the deed and assume the burdens imposed. To accept a deed and assume such burdens, it is obvious that the grantee must have knowl-

edge of the existence of the deed and the burdens imposed by it. Without such knowledge, which McKinney never possessed, the deed could not be accepted. It necessarily follows from all that is revealed by the evidence in this case that there was never any actual delivery of the Williams deed to McKinney and there was never any acceptance of that deed by McKinney.

General rules with reference to delivery and acceptance are laid down in many cases. None of them deviates from the rule which has just been announced. For a brief statement of some of the authorities on this point, the following may be of interest:

> "It is a general rule, * * * *, that it is essential to the validity of a deed that there should be proper and sufficient delivery of the instrument." 26 C. J. S. 231, Sec. 40.
>
> A deed which is never delivered is void. Mosely v. Magnolia Petroleum Co., 45 N. M. 230.
>
> "A delivery to a third person for the use of the grantee may be sufficient, although there had been no authority given to such person to receive the deed provided the grantee subsequently assents thereto." 26 C. J. S. 244, Sec. 43(b).
>
> In order to complete the delivery of a deed, whether such delivery is actual or constructive, and to make the instrument operate as a conveyance of title, an acceptance on the part of the grantee is essential. 16 Am. Jur. Sec. 153; 26 C. J. S. 253, Sec. 51(a); Redmond v. Gillis, 178 N. E. 504.
>
> Where there is no delivery, there cannot be an acceptance, either in fact or in law. Byerly v. Byerly, 2 N. E. (2) 898; Kirby v. Hulette, 192 S. W. 63.
>
> There cannot be an acceptance until the grantee learns of the existence of the deed. Meade v. Robinson, 208 N. W. 41; Sun Building & Loan Assn. v. Gross, 159 A. 401; Taylor v. Sanford, 193 S. W. 661.
>
> Where a deed is delivered to a third person, and is beneficial to the grantee, its acceptance may be pre-

sumed. Neil v. Gross, 101 F. (2) 153; Smith v. Lombard, 258 P. 55.

But assent to a deed which is prejudicial to the grantee will not be presumed, and the burden of proof rests on the party asserting acceptance. 26 C. J. S. 598, Sec. 186; Huber v. Williams, 170 N. E. 195; Sellers v. Rike, 127 N. E. 24.

A deed must be delivered and accepted during grantor's lifetime, Redmond v. Gillis, supra, and must be accepted at the time of delivery unless the act of delivery is a continuing one. St. Louis-San Francisco Ry. Co. v. Logue, 224 S. W. (2) 42.

In addition to the foregoing comments concerning the necessity for delivery and acceptance of the deed, I want to consider, for a moment, the validity of the deeds executed by McKinney and wife. The three deeds which have been mentioned were without question deeds which had been executed by McKinney and wife at their home near Roff when Locke presented the blank deeds for signature. Someone, without authority from McKinney, had filled in the blank spaces describing Pacific Royalty Company as grantee and also giving the description of the Williams land in Lea County, New Mexico. Even if the Williams deeds had been delivered to and accepted by McKinney, it is extremely doubtful that the three deeds executed by McKinney altogether in blank could convey any titles at all. It has often been held that deeds so executed entirely in blank and later filled out by someone without authority and without knowledge of the grantors, convey no title whatsoever. The general rule in this regard has been stated to be:

> "An instrument purporting to be a deed but which was signed in blank form by grantor without description or name of grantee but which was later filled in by the person to whom it was delivered, is a nullity and void and conveys no title. Hurlburt v. Walker, 179 N. E. 34.

In this case the New York Court of Appeals, in an opinion by Crane in which Cardozo, Lehman and others concur, held that a grantor so signing an instrument was not guilty of such negligence as would prevent an attack on the validity of the deed even against subsequent mortgagee. The court said that in signing the deed without acknowledgment the grantor could have reflected that since the instrument lacked a description it was a nullity, and since there was no acknowledgment it could not be recorded, so that there was slight chance of injury to third persons. This case is differentiated by the court from Pence v. Arbuckle, 22 Minn. 417, where a blank deed was signed and acknowledged, on the ground that the grantors knew since it was acknowledged that it might be filled in and recorded, and thereby innocent third persons might be injured. (The Pence case went off on the grounds of estoppel and innocent third parties.)

In Barth v. Barth, 143 P. (2) 542, a blank deed was signed and later filled in by the attorney to whom it was delivered. The Supreme Court of Washington held that in Washington authority to fill in the name of the grantee in a lawfully executed deed may be inferred from the fact of possession of the deed by the person who fills in the blank, but that the well-nigh universal rule is that in order to be valid as a conveyance a deed must contain a description of the land to be conveyed, and that a deed executed in blank is void. The court further said that even if parol authority to fill in the blanks were sufficient, none was shown, and there can be no implication of authority to fill in a description of the property from the mere fact of possession of the deed signed in blank. (This seems to indicate that there must be express authority to fill in the blanks.)

In some jurisdictions parol authority is held sufficient to authorize an agent to fill in the name of the grantee, but other jurisdictions hold that written authority is necessary,

and still others hold that authority of an agent to fill in the name of the grantee must be conferred by an instrument under seal, unless done in the presence of the grantor. 32 A. L. R. 745; 75 A. L. R. 1110; 175 A. L. R. 1303.

A deed signed in blank is a void deed, and in the absence of authority it could not become valid by writing or filling in the essential parts of the instrument over the signature. Schueler v. Lynam, 75 N. E. (2) 464. In Arnston v. Arnston, 237 N. W. 820, a blank deed was signed and the Supreme Court of Minnesota held that there was no transfer of real estate accomplished thereby.

Probably there remains another question which may concern the acceptance of the Williams deed. It may be that Whitehead considered he had authority to accept the Williams deed in behalf of McKinney. If such authority ever existed it is not disclosed by the evidence. To the contrary, Whitehead's subsequent acts indicate that even he did not accept the Williams deed upon the conditions which he laid down himself. Those conditions were that McKinney, the grantee, a relative, would hold the deed for the benefit of the Bates Estate. Although money to pay the Bates Estate was obtained from the sale of the surface rights, the Williams land was not held for the benefit of the Bates Estate. Even before the Williams deed had been executed a purported conveyance from McKinney to Pacific Royalty Company of all of the land had been made without any consideration. Had the land been held for the benefit of the Bates Estate it could have been sold shortly after the execution of the Williams deed. The testimony was introduced that had Whitehead been willing to sell both the surface and the minerals, a sale for more than was eventually realized could have been made, the estate could have been paid quickly and a sum left over above the mortgage indebtedness. Such was not done. But aside from whether Whitehead was really handling the Williams land for the benefit

of the estate is the incontrovertible fact that McKinney at no time gave Whitehead any authority to accept a deed in his name and in his behalf for any purpose whatever. If Whitehead did so accept a deed he was a mere interloper acting without right or authority. Title to the land could not have passed under such circumstances.

Earlier I mentioned a correction deed executed in 1949 by McKinney and wife. The transactions in connection with this correction deed occurred after discovery of oil in the vicinity of the Williams land. The McKinney deeds appearing with a description of him in one place as a single man and in another deed as a married man evidently aroused doubts or suspicion. In any event, a correction deed from McKinney and wife was sought. By that time, acting under the advice of his son-in-law and a real estate man, McKinney was not quite as obliging as he had been. Through the son-in-law and the real estate man, a consideration for the correction deed was demanded and $1,500 was paid, $500 to McKinney, $500 to the son-in-law and $500 to the real estate man. This correction deed and its recitals are of the utmost interest. It was presented to McKinney by a man named Schulte, who appeared for Pacific Royalty Company and the Whitehead interests. It recited in substance that McKinney had never had anything more than the legal title; that he was a strawman and a dummy for Whitehead. From the recitals it is clear McKinney believed at the time he executed the correction deed, the Williams deed conveyed the legal title to McKinney to be held by him for the benefit of Whitehead, which was, of course, untrue. Probably such were the alleged facts represented to McKinney at that time. In all likelihood, McKinney was then told that he had held the legal title but was holding it for the benefit of Whitehead.

In the light of such representations and continuing to be without any knowledge of the true conditions under which the Williams deed had been executed, without know-

ing that the Williams deed actually imposed the burden upon McKinney to hold the title for the benefit of the Bates Estate and that the Williams deed contained the provision by which McKinney assumed the mortgage indebtedness of $900, and further acting under the erroneous information that the deed conveyed legal title to him to be held for Whitehead, he, McKinney, executed the correction deed in 1949. In connection with the foregoing it must also be remembered that McKinney had never seen the Williams deed, had never known of its existence and had never authorized Whitehead or anyone else to accept delivery for him, and finally that when the correction deed was executed McKinney acted under a complete misapprehension of the true facts. It cannot be overlooked that at the time Schulte was negotiating with McKinney to have the correction deed signed, he, Schulte, held what purported to be the original deed in his hand, but when McKinney extended his own hand to take the Williams deed, apparently to examine it, Schulte withdrew the deed and even then McKinney was not allowed to examine and see for himself just what the Williams deed contained.

This most unusual situation existing at the time the correction deed was executed is set forth for the reason there are authorities which hold that when a grantee named in a deed which has not been delivered or accepted later executes a deed conveying the property, the execution of such later deed can constitute an acceptance of the former deed. However, it is believed the cases which so hold involve circumstances altogether different from those which exist in the present case. It is doubted whether any authority can be found holding an acceptance of a prior deed occurs when the grantor in the last deed acted under and in total ignorance of the contents, terms and conditions contained in, and the burdens imposed by, the first deed as McKinney did so act when he signed the correction deed.

Further, and with good reason, it is generally held that an acceptance of a deed by the grantee named must be made within the lifetime of the grantor. Cases which hold otherwise are based upon unusual situations and are contrary to the general rule. In most instances they involve such exceptional circumstances as where the grantee named is under some disability which precludes acceptance prior to the grantor's death. No such unusual situation is present here. McKinney was under no disability and had he known of the Williams deed no reason exists why he could not have accepted it before the death of Williams. Twenty years after the death of a grantor is too late to permit a valid acceptance by the execution of a so-called correction deed, especially when the grantor acts with complete lack of information concerning the original deed and its contents and when the extremely late correction deed contains recitals at total variance with the true facts and conditions of the original deed.

Beyond question I am convinced the execution of the correction deed by McKinney under all circumstances which existed could not and did not amount to an acceptance of the original deed from Williams to McKinney. There having been no previous delivery or acceptance of the Williams deed to McKinney and the correction deed not constituting an acceptance, it, the correction deed, conveyed no more title to Pacific Royalty Company than the previous deeds conveyed.

Under the findings of fact previously made and with others set forth herein, the conclusion that title to the Williams land never passed from Williams and remains today in his heirs seems inescapable.

A defense asserted vigorously which should be discussed briefly and without going into all the facts relative thereto and without citing the great number of cases which bear upon the point is that of laches urged by defendant. The defendant most earnestly insists this doctrine completely bars

recovery by both Bates and the Williams heirs. While not basing my decision on this doctrine, I have already disposed of the issues arising under the claims of the Bates heirs. It is not necessary to be concerned further with their claims. But defendant is entitled to have the views of the Court on its claimed defense of laches and how it may affect the Williams heirs.

In the consideration of all issues in this proceeding it must always be borne in mind that no rights of third parties are involved. It has been held that Whitehead and defendant Pacific Royalty Company were at all times material hereto and to all intents and purposes one single entity. The knowledge and doings of Whitehead are all chargeable to Pacific Royalty Company.

The doctrine of laches is an equitable defense which arose to prevent inequities. It is never allowed to create an inequity or to do that which it was designed to prevent.

Knowledge of essential facts must exist before the doctrine of laches applies. One who has no knowledge of facts which might create a cause of action and without reasonable available means or opportunity to ascertain the true facts can hardly be barred from asserting his rights within a reasonable time after the facts are ascertained. To hold otherwise would permit and create an inequity in the name of equity. Such an inconsistent, if not intolerable, decision should not and will not be made by a court of equity.

Throughout the trial of this case I have been impressed that the Williams heirs never had any knowledge until most recently of the real facts and conditions under which their father's deed was executed. They never had any knowledge at all of the failure of delivery and acceptance by McKinney of the Williams deed. The heirs were ignorant of the facts which impress me so strongly—that title had never passed to McKinney and likewise had never passed to the Pacific Royalty Company.

Although death and the passing of many years prevent us from knowing exactly what Lester L. Williams knew of transactions subsequent to his execution of the deed, I think it is reasonable to infer from known facts that Lester L. Williams himself had no information except that represented to him by Whitehead. He never learned and died without knowing that McKinney was not a relative of Gertrude Bates; that his deed had never been delivered to or accepted by McKinney; that McKinney did not hold the land for the benefit of the Bates Estate and that he, McKinney, never knew the Williams deed existed, nor that McKinney had no authority whatever to release the mortgage or the coupons, about which Williams did anxiously inquire. To the contrary, and in the light of Williams' persistent inquiries as to the grantee, McKinney, and his authority, it may reasonably be assumed that had Williams known the facts he, Williams, would have acted promptly in whatever way he might have had available. Everything indicates quite clearly that Lester L. Williams remained entirely ignorant of all the essential facts and that such ignorance continued until the day of his death.

Further, it is not believed that either Lester L. Williams or his heirs had any reasonable or available means of acquiring knowledge of the true facts. Certainly Whitehead would not have informed them that McKinney had never received or accepted the deed; nor would he have told them McKinney was not a relative of Gertrude Bates and had no authority of any kind. McKinney himself was in a distant state and it is doubted whether any of the Williams family knew McKinney's whereabouts. It must always be remembered that Lester L. Williams and his children were poor people without finances to investigate thoroughly. The feeble attempts made by the Williams boys show how unavailing were their efforts to learn the truth. They exercised all the means they had available. The records of Lea

County examined by one as early as 1928 or 1929 and by another in 1950 revealed nothing. The lawyer and abstracter consulted went no further than to check the county records, from which it would naturally be assumed, as I am sure it was, the Williams' interest in the land had passed to McKinney. Considering all the circumstances, including ill health and shortly the death of the father, poverty and possibly even ignorance, it would be most unjust for a court of equity to hold the Williams heirs to be barred by laches.

Another factor which prevents the application of the doctrine of laches is that the defendant, Pacific Royalty Company, has been in no sense injured by any delay in asserting the Williams claim, except possibly it may be injured by not having the benefit of Whitehead's testimony. I considered this seriously in connection with the claim of the Bates heirs and concluded that if Whitehead's testimony had been available he probably could have proved he had full authority to do everything he did in connection with the Williams land. I am of that opinion so far as the Bates claim is concerned. But, as stated in the beginning of the discussion of the issues raised by the Williams claim, their rights are based upon altogether different facts and legal principles than were those of the Bates heirs. While important evidence was missing relating to the Bates claim and the evidence available was to an extent consistent with Whitehead's authority to act as he did, such is not the case as concerns the Williams' right of action. In connection with it the chain of circumstances is not broken in any material respect. If death had not intervened, Whitehead's testimony could hardly have changed the legal effect of his dealings with Williams and the complete failure of delivery to and acceptance by McKinney. Whitehead's letters to Williams write their own story and that most plainly. While I shall not now discuss the possible fraud in connection with the Williams transaction, there are facts which should

not be overlooked and about which and their effect I may later elaborate fully. Testimony by Whitehead, had it been possible to obtain it, could not have changed the undeniable facts which stand out so clearly. His testimony could not have shown that the defendant had been prejudiced or its condition or situation changed in any way by the delay in asserting the Williams claim. Neither Whitehead nor the defendant paid any consideration for the minerals under the Williams land. Neither made any improvements and neither expended a single dime on the land or the minerals under it. Under New Mexico tax laws neither was required to pay taxes on the minerals. Neither ever went into possession of the land and neither ever reduced the minerals to possession. In truth and fact, so far as the record reveals, neither Whitehead nor Pacific Royalty Company ever did anything with or about the minerals except to refuse to part with them and, as I observed at the hearing, the tenacious holding on to the minerals (as Whitehead himself said, "getting a free ride") may have made it possible for the real owner to share in the vast riches which are accruing from the oil development. But such mere holding of record title, without investment, improvements or expenditures of any kind, can create no strong equities, especially when all the circumstances surrounding the acquisition of that record title are considered. Aside from present development being made by Shell, the only person who ever made any investment in this land or the minerals was the homesteader, Lester L. Williams. The defendants' position has not been changed. It has been injured in no way by the delay in asserting the Williams claim.

In saying what I have about expenditures I am not unmindful of, nor have I overlooked, the $1,500 paid for the correction deed. I do not consider it to be an investment in this property at all. It was only paid under pressure from the real estate dealer and McKinney's son-in-law, each of

whom received $500, for the purpose of correcting apparent defects in the record title in order that the defendant could close its deal with Shell Oil Company and receive the cash payment of $96,000 plus $1,000 per acre payable in oil and the other consideration which would accrue by virtue of the retained royalty. It was to improve greatly the financial condition of the interested parties rather than to make any genuine contribution to the property involved in this action. No actual contribution which in any way tended to increase the value of the property was ever made by either Whitehead or Pacific Royalty Company.

Moreover, I cannot escape another conclusion which prevents the application of the laches doctrine against the Williams heirs. I have held that all the deeds from McKinney to the defendant, including the correction deed, were invalid and conveyed no title. I have held that McKinney never had title, legal or equitable. Under such holding, defendant never had any contact with the title to the Lea County land. Defendant was never in possession of the land and never reduced the minerals to its possession.

In Mosley v. Magnolia Pet. Co., 45 N. M. 230, it is held:

> "Laches never run in favor of one who has never contacted the title or possession of the property."

And again in the same case the New Mexico Supreme Court makes the following statement:

> "We know of no rule of law that permits one, who has neither a legal or an equitable interest in property, or the possession of it, to avail himself of the bar of laches against the owner."

On the point that some change must occur, the opinion in the case of Yates v. American Republics Corp., 163 F. (2) 178, contains the following language with reference to laches:

> "It is essential that there be some change in the condition of the property or in the relations of the

parties which makes enforcement of the rights inequitable."

Another very interesting case involving facts somewhat similar to those in the case under consideration, and in which it was held that recovery was not barred by laches, is that of Carter Oil Co. v. Crude Oil Co. (Okla.), 201 F. (2) 547.

The foregoing, with other authorities such as City of Roswell v. Mountain States Telephone Co., 78 F. (2) 379, together with general principles applicable to facts found to exist in this case, would seem to deprive defendant of any defense under the equitable doctrine of laches.

From all the facts which have been found, as well as those herein set forth, and with the conclusions indicated in the views I have expressed, it is clear I am of the opinion the title to the Lea County land insofar as the minerals thereunder, including oil and gas, are concerned, remains and is now vested in the Williams heirs. Having reached a decision of this finality, ordinarily a decree in favor of the Williams heirs to the exclusion of the Bates heirs and against Pacific Royalty Company would be entered as a matter of course. An unfortunate situation occasioned by the action of the two plaintiffs makes it impossible to enter that decree at this time. The entry of a decree in favor of the Williams heirs is further complicated by the injection of the man Gilmore as a possible beneficiary of my decision.

From the allegations contained in the original complaint and the evidence adduced, it appears that the two plaintiffs, the Bates heirs and the Williams heirs have made "common cause" against the defendant. The claims of the two plaintiffs are adverse, antagonistic and mutually destructive. Likewise, the plaintiffs have also agreed to reimburse Gilmore in the sum of $3,000, notwithstanding that

this court has decreed in another case, upon stipulation of counsel, that Gilmore has no interest in the property involved here and that he be barred from asserting any claim to the Williams land. Although I have previously decided the Bates heirs have no interest in the property involved, under the agreement between the two plaintiffs a decision now in favor of the Williams heirs would result in awarding the Bates heirs a one-half interest in the very same property. A decision in favor of the Williams heirs would destroy and nullify that part of my decision holding the Bates heirs are entitled to recover nothing. The Bates heirs would receive every benefit they would have received had I decided they did have an interest in the property. A decree in favor of the Williams heirs would, at least in part, be suicidal and self-destructive, if such terms may be applied to a court decision.

Perhaps parties to an equity cause by private contract have the power to place an equity court in such an intolerable position, but I seriously question and doubt the right or power of litigants to so prostitute a decision of a court of equity. Entering a decree so completely destructive of my findings of fact and conclusions of law, granting most substantial benefits to a party I have found not to be entitled to those benefits, makes no appeal to my sense of equity or justice. No court, least of all a court of equity, should ever permit its decrees to accomplish such an unwise, unjust and unconscionable result. My finding that Whitehead may have been fully authorized to do as he did places the Whitehead heirs in a better position and with greater equities than the Bates heirs, so far as their claim is concerned and without reference to the decision reached on the rights of the Williams heirs. With this in mind I cannot overlook that a decision in favor of the Williams heirs under their agreement with the Bates people would take everything from the Whitehead heirs and award, in

effect, one-half the property to the Bates heirs, whose equities are less than those of the Whitehead heirs. Such result under such circumstances would be most unconscionable. A court of equity can and should prevent its decrees from achieving such a result. Only by blindly ignoring perfectly plain and obvious inequities created by my decision can I now enter a decree in favor of the Williams heirs.

In accordance with long and well established principles, there are any number of cases which lay down the general rule that a court of equity should not enter a decree which is inconsistent with equity and good conscience. While the case of Fryer v. Weakley, 261 F. 509, deals with indispensable parties to the action, nevertheless it declares the foregoing principle to be one well established in equity jurisprudence.

> "That equity will not, in the name of equity, grant relief which is inequitable and unwise is an elemental principle. First Nat. Bank v. Basham, 191 So. 873, citing Brown v. Tuskegee Light & Power Co., 168, So. 159; Sloman-Polk Co. v. City of Detroit, 247 N. W. 95."

The foregoing are not cited as being comparable with the facts apparent in the case under consideration, but they, as well as many others, announce the general rule which forbids a court of equity to enter a decree which is inequitable, unwise or unjust.

The dilemma in which I find myself is not caused by either fact or law. Correct or incorrect, a decision on the facts and principles of equity and law has not been difficult. The difficulty with which I am confronted arises solely from the strange and unusual agreement of parties having adverse and antagonistic claims joining together against the defendant. By their private agreement the plaintiffs have created the difficult and embarrassing position in

which this court is placed. It is for them to solve the problem and extricate themselves and the court from a situation in which the court's decision as the case now stands would cause as much injustice as it would effect that justice all courts desire to administer.

With these thoughts in mind, I have decided to depart somewhat from the procedure I outlined to counsel in conference.

First of all, I have definitely determined a decree should be entered barring the Bates heirs from asserting any title or claim to the property. I am prepared to enter a decree to that effect at any time.

I have decided to give the Williams heirs an opportunity to cleanse, or rather rid, themselves of their associates, the Bates heirs and Gilmore. To that end I will allow the Williams heirs thirty days in which to meet the condition I thus lay down. To meet this condition, Williams heirs must be able to advise the court that neither the Bates heirs nor Gilmore will receive any benefits resulting from a decision in favor of the Williams heirs.

If this condition can be met within the time specified, I am prepared to enter a final decree in favor of the Williams heirs and against Pacific Royalty Company. A decree to this effect would effectively dispose of all issues in this case, so far as it lies within the power of this court finally to end litigation of this nature.

If this condition cannot be met, and I fully realize the complications which may exist, I shall make and enter another decision which, as I have indicated, may differ from that discussed with counsel.

Usually when a court of equity is confronted with a situation such as is presented here, the parties are left where the court finds them. But that decision does not appeal to me at this time. Leaving the parties where I find them might be the easy way for the court to escape from a situa-

tion created by the parties themselves, but I am of the opinion it is far better that this controversy be settled definitely, although one party loses valuable property. Even the losing party is benefitted by a final decision rather than to have the determination of his rights held in prolonged suspense. For that reason I shall endeavor to dispose of the entire matter, if at all possible. I do have in mind another and different solution which I do not now discuss simply because I am fearful it might itself prove to be both unjust and inequitable to all parties. If such should be the case I would be doing that which I most earnestly seek to avoid.

For the present, any decision other than as to the Bates heirs will be delayed pending the expiration of the thirty days given the Williams heirs to disassociate themselves and their claim from those whom I have found are not entitled to relief.

CARL A. HATCH,
Judge.

Filed September 12, 1953.

District Court of the United States

DISTRICT OF NEW MEXICO

CARL H. WILLIAMS, et al,
Plaintiffs,

v.

PACIFIC ROYALTY COMPANY,
Defendant.

No. 2094
Civil

SUPPLEMENTAL MEMORANDUM

A preliminary opinion indicating my views on certain phases of the case has been filed. That partial opinion was filed mainly in order that the plaintiffs might proceed without delay to meet, if possible, the condition imposed. Such meeting of the condition mentioned seemed desirable before the entry of a final decree. But, as was indicated, that partial opinion did not determine all issues involved, and at least one important contention of plaintiffs was not discussed. Due to trial work, the final opinion has been delayed until this time. To determine all questions involved, some further discussion of facts and issues is necessary. In this, as in the preliminary opinion, all pertinent and relevant statements of facts made should be considered as findings of fact. All that is hereinafter set forth should be considered in connection with, supplemental to and as a continuation and part of the original opinion filed. The two together shall constitute and be the single opinion of the Court.

I have held that the Bates heirs are not entitled to recover; that it is possible Whitehead may have had authority to act as he did with reference to the Williams land

insofar as the claim of the Bates heirs is concerned, and also that the trustees of the Bates estate and the Bates heirs themselves were negligent and dilatory in asserting any claims for relief and they did not act with that reasonable diligence required to obtain relief from a court of equity. In making this decision I do not want to be understood as finding that the conduct of Whitehead even with relation to the claim of the Bates heirs was free from wrongdoing. On the contrary, I find that there was much in the way Whitehead handled the Williams mortgage which was not compatible with that fair dealing required of an attorney representing a client, as Whitehead did so appear and act in the foreclosure proceeding; and further, his conduct, although he might have had authority to make a personal profit for himself, was not compatible with that relationship which should exist between principal and agent. In short and without commenting further as to Whitehead's conduct as it relates to the Bates claim, I shall only say that conduct on this part, from beginning to end, meets with my hearty disapproval and nothing which I have said should be construed as an approval of the way Whitehead handled the Williams mortgage.

My decision that the Bates heirs are barred and precluded from asserting any rights makes it unnecessary to discuss the conduct of Whitehead with respect to that claim. Such is not the case as concerns the claim of the Williams heirs. Notwithstanding the views previously expressed in the preliminary opinion that the Williams heirs at this time hold the title to the lands in question and that that title never passed from their ancestor, Lester L. Williams, to C. H. McKinney, and that McKinney's deeds were entirely ineffective to pass title to the defendant, Pacific Royalty Company, there remain other grounds than those stated which should be discussed so that the views of the trial court may be made clear and certain in such respects.

I refer now specifically to the claim of fraud on the part of Whitehead as fraud may affect the rights of the Williams heirs. I am always hesitant to use language or to make findings which may tend to reflect upon the conduct and dealings of one who is dead and who cannot speak for himself. But no personal hesitancy can justify a court from determining issues which come before it strictly in accordance with the facts of the case as they appear to the court from the evidence adduced. The facts must speak for themselves. In the present case, the facts speak rather than the Court. I now proceed to make the following definite findings and determination on the issue of alleged fraud on the part of Whitehead insofar as the same may affect the claim of the Williams heirs. I cannot escape the decision that fraud on the part of J. E. Whitehead permeates, saturates, contaminates and vitiates every transaction with relation to the Williams land, almost from the time the note and mortgage were sent to the Union Mortgage Company, down to and including the date of the correction deed by McKinney. In the discussion concerning the Bates claim, I remarked the evidence as to that claim was not of that clear and convincing nature necessary to establish fraud. Such is not the case in connection with the Williams claim. The evidence is not lacking. It is clear and convincing. Although almost more than a quarter of a century elapsed between the commencement of the wrongful conduct and the last acts which influenced and caused the execution of the correction deed, the earmarks, badges, and the taint of fraud are clear and apparent. Only a recital of part of the uncontroverted facts, or at least most of which are uncontroverted, will be made here. Space and time prevent a recital of all which I have considered. As was observed in the preliminary opinion, the acts, conduct and dealings of Whitehead are chargeable to both the Union Mortgage Company and the Pacific Royalty Company for both were his individual creations

and creatures. Behind the cloak of a corporate organization, fraudulent acts and conduct of individuals owning such corporation cannot be concealed or hidden, and the cloak of corporate organization cannot protect or shield one from wrongdoing and fraudulent acts.

The first transaction relating to the Williams land, of which we have definite proof or knowledge, is the deed purporting to convey Lea County land owned by Lester L. Williams from C. H. McKinney to Pacific Royalty Company. That deed was dated October 16, 1926. This deed must have been one of the deeds McKinney and wife executed in blank. Those deeds were signed at instigation of Joe Locke and I must infer from all the evidence that they were delivered by Locke to Whitehead. These deeds were not only executed in blank without consideration, without grantee and without description of property, but also the acknowledgments were spurious and false. Again, inferring from proven facts, I find that Whitehead used one of these deeds and without any authority from McKinney filled in the name of Pacific Royalty Company as grantee, also the description of the Williams land, from which acts it would appear, although it was entirely false, that McKinney, as grantor, had conveyed the Lea County land owned by Lester L. Williams to the Pacific Royalty Company. The spurious deed bears a date (October 16, 1926), approximately two months before Lester L. Williams acknowledged the deed, which he later did execute and at a time before Whitehead had even filed a foreclosure suit against Williams and before Williams had any knowledge that foreclosure against him was contemplated. This deed, so executed, did not purport to convey merely the mineral rights to the land, but it was a conveyance of all the real estate, both surface and mineral. Thus, Whitehead's first act was to use a fictitious and fraudulent deed to convey the fee simple title to his dummy corporation, the defendant herein.

I must find that this deed was executed with fraudulent intent and purpose, running against both the purported grantor, C. H. McKinney, and the true owner of the land, Lester L. Williams. Surely, it is a fraud to use a fictitious deed in an attempt to convey real estate which is owned by another person. A deed conveying land owned by Lester L. Williams, of which deed Williams had no knowledge whatsoever, must amount to a fraud against him. Similarly, to fill in blank spaces in a deed conveying land of which the grantor, in this case McKinney, never had any knowledge, and without his authority, in which he, the grantor, makes representations as to ownership, warranty of title, etc., as this deed did, must be a fraud upon a grantor. This fraudulent, illegal and invalid deed was not placed of record for more than twenty years. Such facts do speak most loudly and must be heard.

Alone, this deed may not be a sufficient showing of fraud, but in connection with subsequent acts concerning the Williams land, I do attach weight to this very beginning of the entire series of transactions, which all together and considered as a whole, do amount to and constitute fraud, beginning in October, 1926.

The next footprint which appears along the trail of misconduct and wrongdoing is the correspondence with Lester L. Williams. The letters from Whitehead to Williams write their own story. Not only do they write their own story, but they speak their own condemnation. It is unnecessary to restate what I have said from the bench and in the views formerly expressed. To make it clear, it is only necessary to find as I do that the representations made to Williams that C. H. McKinney was a relative of Gertrude Bates and that he would hold the Williams land for the benefit of the Bates estate were false and untrue. They were made by Whitehead with the intention to deceive Williams and to induce Williams to execute a deed to the

land under the belief that McKinney was a relative of Gertrude Bates and that McKinney would hold the land for the benefit of the Bates Estate, and, also, that he, Williams, would be released from all liability. I find that Whitehead made such false and fraudulent representations knowingly to mislead and deceive Williams.

By recording the Williams deed, as Whitehead did, knowing at the time that the grantee, McKinney, was not a relative of Gertrude Bates and that the land would not be held for the benefit of the estate, was itself a fraud committed by Whitehead. Such recording of the deed was also fraudulent as to McKinney, who, under that recorded deed, was assuming the obligation of the mortgage indebtedness and who, under the representations made to Williams, was assuming an obligation to act as trustee for the Bates estate when he, McKinney, knew nothing of Williams or his deed, knew nothing of the obligations to be assumed, knew nothing of the Lea County land, and knew nothing of the Bates estate.

Confronted with such an undeniable false statement of fact, counsel for defendant seek to avoid the legal import and effect of such representation by arguing it was not material. With that argument I cannot agree. The courts uniformly hold that a grantor has the right to know his grantee. Any representation as to the grantee and the capacity in which he is to receive title is so material it cannot be rejected as being immaterial and of no consequence.

Continuing the same practice of deceit and misrepresentation to Williams, Whitehead did not release Williams from liability when he received the Williams deed. Instead, he dismissed the foreclosure suit "without prejudice". For some reason, these words "without prejudice" loom largely in my mind in connection with the charge of fraud. If Whitehead had been dealing honestly and fairly, with all good intentions and purposes, having promised to release Williams from that mortgage and having received Williams'

deed, why did he insert those words "without prejudice"? Why would any fair-dealing attorney want to reserve or preserve the right to reinstate an action against one he had promised would be released and discharged from all liability?

Probably it is unnecessary to continue a discussion of the particular acts which point to fraud and all the different items of evidence and proof which have caused my findings of fraud. There is much in the evidence which has not been and will not be discussed. However, a brief summary of some of the outstanding facts which can hardly be denied will be set forth. But the facts enumerated are not to be considered to the exclusion of other important facts not included. Some of those facts are as follows:

It was a fraud upon Lester L. Williams for Whitehead to represent that McKinney was a relative of Gertrude Bates and that McKinney would hold the land for the benefit of the Bates estate;

It was a fraud upon Williams to represent that McKinney had authority to execute a proper release, as Whitehead must have represented in response to Williams' inquiry;

It may have been a fraud upon Williams to threaten Williams with a deficiency judgment in the Lea County foreclosure suit, when no such deficiency judgment would have been valid without William's voluntary appearance in the action, as Williams was then a non-resident of the State and he could easily have avoided service of process upon him within New Mexico;

It was a fraud upon Lester L. Williams to dismiss the foreclosure action "without prejudice" when Williams had been assured he would be released from liability;

It was a fraud upon Williams to use the fictitious deed dated October 16, 1926, withhold it from record for twenty years or more, and then place that deed of record as evidence that title had passed from McKinney to Pacific Royalty Company on October 16, 1926, when, on that date,

no foreclosure suit had been filed and no deed had been executed by Williams, and no title then or ever had passed to McKinney.

It was a fraud upon Williams to use a blank deed signed by McKinney alone, under circumstances previously set forth, and to fill in the blank without authority from McKinney, and describing McKinney as a single man, and conveying the minerals to Pacific Royalty Company, without consideration, and detrimental to the Bates estate, rather than to or for the best interests of that estate. It was, likewise, a fraud upon Williams to place that fictitious deed of record as was done by Whitehead in April, 1927.

It was a fraud upon Williams to refuse to sell the land with the minerals, when a better price could have been obtained by a sale of the land with the minerals in view of his representation that McKinney would hold the land for the benefit of the Bates estate.

For the same reason, it was a fraud upon Williams to sell the surface of the land to Denton, when Williams had executed his deed to McKinney to hold all the land for the benefit of the Bates estate.

It was a fraud upon Williams not to return his original notes promptly and to release him from all liability before his death.

It was a fraud upon Williams to withhold releasing and discharging the mortgage for almost four years and not within the lifetime of Williams.

Although twenty odd years later, it was still a fraud upon Williams to secure a correction deed from McKinney upon the representation that the deed executed by Williams and wife had been for the purpose of conveying the legal title to McKinney for him, McKinney, to hold the title for the benefit of Whitehead.

It was a fraud upon Williams to conceal from McKinney the true facts or deal with the Williams land in

any way, or to attempt to convey the same, either surface or minerals, by the use of fictitious deeds supposedly signed by McKinney, when there had been no delivery or acceptance of the Williams deed and while the full fee simple title remained in Williams.

Although I have characterized several separate acts as constituting fraud, for the most part, they are but successive steps in the original fraud committed by Whitehead, and perhaps would better be described as evidencing the original fraudulent transaction. In the instance of the correction deed, the person who made the misrepresentation at that time may not have had actual personal knowledge of the falsity of the representations made to McKinney or of the false recitals in the deed. Nevertheless, it is the general rule that when one makes a positive affirmation of a material fact, it does amount to fraud even though the person may not have known the true facts and was in ignorance of them. A minority rule goes so far as to hold in some cases that even if one has good reason to and does believe the representations to be true, he is, none the less, liable if they are in fact false and untrue. Regardless of any liability on account of the false representations made, and the false recitals in the correction deed, which were and are so manifestly false and untrue, the defendant, Pacific Royalty Company, should not be permitted to gain any advantage, or base any title or claim derived from, or grounded upon, any such false and untrue representations and recitals.

In truth, every transaction in connection with the Williams land, from the first deed of October 16, 1926, until and including the execution of the correction deed in 1949, involves some element of misrepresentation and all bear the taint of fraud.

Therefore, and in consideration of all the evidence, I must hold the deed executed by Lester L. Williams and his

wife should be rescinded and cancelled and now adjudged to be null and void.

Although it is believed the observations already made sufficiently show that this fraud was not discovered by Lester L. Williams during his lifetime, it should be made clear that I do definitely infer and find from all the evidence, that Lester L. Williams did not know of the fraud practiced upon him during his lifetime, and I make the same inference, deduction and finding as to Josie Williams, the wife of Lester L. Williams. She did not learn of the fraud practiced by Whitehead. It is obvious neither could have known of the fraudulent correction deed, because it was executed long after both had died. And I am equally certain that neither ever knew of Whitehead's fraudulent transactions with their land, nor did they know at any time that the representations made by Whitehead to secure their deed were false and untrue.

Again, in the discussion of laches, I affirmatively found that the heirs of Lester L. Williams, the principal plaintiffs in this case, had no knowledge of the fraud which had been practiced upon their father, and mother, and had no reason to know the same, and were entirely ignorant of it until a very short time before the filing of the present suit. The attempts made by the heirs to discover fraud or wrongdoing, if any existed, availed them nothing. They exercised all the reasonable care and diligence which could have been expected or required of persons in their circumstances and conditions of life. Without more knowledge than they possessed or should have possessed, it must be found that they did act with reasonable diligence, and there was no discovery of the fraud by them or any of them until just prior to the filing of this suit.

In the light of the findings which have been made, I must conclude that fraud does so contaminate all the transactions involving the Williams land, the plaintiffs, the

Williams heirs, are entitled to rescind and to have the deed executed by their father and mother to McKinney cancelled and held to be null and void.

The findings and conclusions which have just been stated are made, notwithstanding my previous decision that title did not pass from Williams. Such finding and conclusion of fraud must not be considered in any way as negating my first conclusion that title did not pass from Lester L. Williams. If, however, for any reason, it should be determined ultimately that title did pass from Williams to McKinney, the fraud which I found did and does exist is sufficient to nullify and vitiate the deed so executed by Lester L. Williams and his wife.

As I have indicated in the findings and conclusions stated here, and in the preliminary opinion, together with the findings and conclusions orally announced, I now adjudge and hold, and the final decree should adjudicate definitely:

That the plaintiffs, the Bates heirs, have no interest in the land involved in this action, and that they are not entitled to recover; that the Lester L. Williams deed was never delivered to and was never accepted by McKinney, and the title to the Lea County land, the subject of this litigation, never passed from Lester L. Williams and his wife, Josie Williams; that the title to the minerals in and under said land is now vested in the plaintiffs, the Williams heirs; that the Williams heirs are entitled to and should have their title to the minerals in and under said lands quieted and forever set at rest against all claims, rights and demands of the defendant, The Pacific Royalty Company.

That the decree to be entered be sufficient muniment of title to said minerals and sufficient to vest full title in the Williams heirs to all the minerals, including oil and gas, in and under the land, the subject of this controversy.

That the decree shall provide for an accounting by Pacific Royalty Company of and for any and all sums received by

it, arising and accruing by virtue of its claimed ownership of the minerals under said land, and all sums received as rental, royalty, cash bonus, or otherwise, in connection with any and all oil and gas leases covering the lands or minerals involved herein, executed by it at any time to any person or corporation. The time and place for such accounting will be set for some later date to be fixed by the Court.

Generally, in substance, the decree shall provide for carrying into effect, this final decision between the plaintiffs and the defendant. Counsel for plaintiffs will prepare the formal decree and submit it to counsel for defendant, who should endorse their approval as to form.

I used the term "final decree" between the plaintiffs and the defendant, notwithstanding I have and am withholding my decision on the accounting and upon another point to be mentioned later.

The authority of a court to reserve a decision on an issue not connected with the main question settled in the final decree can hardly be doubted. Any doubts which may have existed are entirely removed by many decisions. In the 10th Circuit, the decision in the case of Kasishke vs. Baker, 144 Fed. 2nd, 354, certiorari denied, 325 U. S. 856, definitely recognizes and upholds the power of the court to withhold or reserve its ruling on issues not necessarily involved in the main decision rendered. This decision and others hold that the decree settling the principal issues between the parties is final and appealable, notwithstanding a decision on issues not involved in the final decree is reserved.

In the exercise of the power so recognized, I do reserve the right to proceed with the accounting ordered to some latter date, and I further now reserve and withhold my decision as to a possible issue between the co-plaintiffs. That issue did not arise at the trial. It is not raised by any

pleading. It was raised by me after I had determined the Bates heirs were not entitled to recover, and that the Williams heirs were the owners of the minerals and were entitled to all proper relief. Thus, I determined one plaintiff was entitled to recover and the other was not.

Although it is aside from the question I am discussing, it might be well to note here that the authorities sustain the power of a court of equity to decide in favor of one joint plaintiff and against another joint plaintiff. It appears to be settled that where there are several plaintiffs, the old common law rule that all or none must recover does not apply in courts of equity. It hardly seems necessary to review the authorities on this point. I mention it only because a question might arise as to whether I had considered the point. It has been considered, and the authority to so decide against one plaintiff and in favor of another plaintiff appears to be ample and sufficient.

I now return to the issue which I raised as regards the right of the Bates heirs to profit from or share in the award made to the Williams heirs, after I have decided the Bates heirs were entitled to recover nothing. Ordinarily, under such a decision, the Bates heirs would not be entitled to share in the recovery decreed for the Williams heirs. But in this case, some private agreement was made between and among the Bates heirs and the Williams heirs by which the two sets of plaintiffs would share equally in whatever benefits might be awarded to either or both. At least, this is my general understanding of the arrangement. In the preliminary opinion I rather sharply criticized this agreement as being destructive of the court's decision. On account of certain facts surrounding that agreement, which will not be stated, I have seriously considered different ways or methods of avoiding the effect of that agreement, which may involve questions as to the right of joint plaintiffs to circumvent the court's decree and render it ineffective.

I have not questioned the good faith of the plaintiffs. I have not and do not imply any intentional wrongdoing on the part of anyone in connection with the agreement of the plaintiffs. But there is a question involved which should be determined. At a later date, at a time to be fixed, I will set that issue for hearing and will hear all the facts plaintiffs may care to produce relative to their agreement. Also, counsel will be given opportunity to present their views and argument. In short, I have decided that the plaintiffs are entitled to their day in court on this issue, if they desire to be heard. Accordingly, I am reserving any decision on that issue until the plaintiffs can be heard and when all facts and circumstances surrounding the agreement can be more fully developed.

Although this reservation should be made in the final decree, a later decision as to the respective rights of the joint plaintiffs will have no bearing upon it, nor in any way affect the main decision on the issues which exist between plaintiffs and defendant. Those issues are all definitely and finally determined by the decision made and which will be included in the decree hereinbefore ordered to be filed. That decree will fully dispose of all issues between plaintiffs and the defendant. It will be final and appealable.

Having decided to postpone a decision on the issue between the plaintiffs until a later time, I now withdraw any and all remarks made in the preliminary opinion, or herein, insofar as the same may reflect upon that issue. Nothing which has been said should be given any consideration, at least until after all matters in connection with the agreement have been fully explored and developed.

Sufficient time and notice will be given counsel in order that all pertinent facts may be disclosed and views of counsel may be heard and considered before a final decision on the rights of the Bates heirs to share with the Williams heirs is made.

Due to interruptions of various kinds, the logical sequence which should be followed in an opinion has been broken more than once in setting forth the views hereinbefore expressed. After what has been written and this supplemental opinion was ready for filing, counsel for the defendant filed its motion for permission to re-open the case and submit further evidence. While, in any case, especially one involving as much as the present case involves, it is my desire that counsel present all they deem pertinent, I have decided to shorten the proceedings on motion to adduce additional testimony, and, with consent of counsel, I shall now, in this opinion, pass upon the motion. In so doing, I now overrule plaintiffs' legal objections to the consideration of the evidence set forth in paragraphs numbered 1 and 2 of the amended motion to re-open, and now re-open the case and consider as evidence the facts set forth in said paragraphs numbered 1 and 2 of defendant's motion. I shall further, and do now, deny defendant's request to submit the testimony or evidence suggested in paragraph 3 of defendant's motion to re-open.

In connection with my refusal to permit introduction of testimony, as outlined in paragraph 3 of the motion, I should state as a fact, and I do, that, as has been set forth previously, the Williams heirs did not know or discover the facts, nor the legal effect of such facts, which the Court has found to be fraud on the part of J. E. Whitehead and the defendant, and also had no knowledge of the facts or the legal effect of such facts as concerns the non-delivery to and the non-acceptance by McKinney of the original Williams deed, until their present attorney, Mr. Wynne, visited them at their home shortly before the filing of the present suit, at which time they, the Williams heirs, became aware of the facts and their legal rights, and the claim which they have asserted in this action; that that occasion was the first time the Williams heirs asserted the claim they now rely upon in this case. From this, it necessarily follows that the Pacific Royalty Company did not

have actual knowledge of the Williams claim at the time the expenditures set forth in paragraphs 1 and 2 of defendant's motion to re-open were made. Still further, in this connection, however, I re-state what has been found previously, that J. E. Whitehead was still living at the time the expenditures were made, at all times had full knowledge of all the facts, including the non-delivery to and the non-acceptance of the Williams deed by McKinney, and of all facts which the Court has found to constitute fraud, including the use of the spurious and fictitious deeds, and that at all times, including the time the expenditures were made by defendant, set forth in paragraphs 1 and 2, the knowledge of all facts possessed by J. E. Whitehead was imputed and chargeable to defendant, Pacific Royalty Company; that, therefore, at the time the expenditures set forth in the motion were made, the defendant, Pacific Royalty Company, did have knowledge that it never possessed or obtained title to the minerals in controversy here, and at all times knew of the fraud practiced upon Lester L. Williams and his wife.

In connection with the expenditures actually made, as set forth in paragraphs 1 and 2, I find that such expenditures were made with full knowledge of all facts surrounding the case; that it never had title to the minerals; that if any title ever passed to it, such title was so tainted with fraud, it was always subject to be cancelled and forfeited; that the expenditures made were not for the purpose of improving or adding to the land, or the minerals thereunder, and contributed nothing to the land or to the minerals. Said expenditures were made by the defendant in an effort to retain to itself the title to the minerals, which title had never passed to it, or, if some color of title had passed, even that was so permeated with the fraud of J. E. Whitehead, chargeable to it, the defendant, that the title was always subject to be annulled and cancelled.

Therefore, notwithstanding the admission in evidence of the amount and nature of expenditures made by defendant, as set forth in paragraphs 1 and 2 of the motion to re-open, and notwithstanding that defendant may not have had actual knowledge that the Williams heirs did, or would, assert claim to the minerals, I must adhere to the views hereinbefore expressed, and again instruct the preparation of the final decree in form and substance as I have indicated in the foregoing part of this supplemental opinion.

CARL A. HATCH,
Judge.

Filed Nov. 6, 1953.

United States Court of Appeals

TENTH CIRCUIT

Sixteenth Day, May Term, Tuesday, June 21st, 1955

Before:

Hon. ALFRED P. MURRAH,
Hon. JOHN C. PICKETT,
Circuit Judges,
Hon. ROYCE H. SAVAGE,
District Judge,

PACIFIC ROYALTY COMPANY, etc.,
Appellant,
v.
CARL H. WILLIAMS, *et al.*,
Appellees.

JOHNSTONE BATES, *et al.*,
Cross-Appellants,
v.
PACIFIC ROYALTY COMPANY, etc.,
Cross-Appellee.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court insofar as it relates to the appeal of the Pacific Royalty Company in case No. 4827, be and the same is hereby reversed with instructions to enter judgment quieting title to the mineral rights in the Pacific Royalty Company, and insofar as it relates to the cross-appeal in case No. 4828 the judgment is affirmed.

It is further ordered that Pacific Royalty Company, a corporation, in case No. 4827, have and recover of and from Carl H. Williams, John W. Williams, Mrs. John A. Cline, Jr., John A. Cline, Jr., Mrs. F. S. Hollebeke, F. S. Hollebeke, Paul Eugene Williams, Jr., Lottie May Treas, Robert M. Treas, Byron Leslie Williams, Marvin Lester Williams, Ruby Leona Williams, Jessie R. Williams, Edith Lillian Williams, single, who is incompetent and who brings this suit by her next friend, Carl H. Williams, appellees, its costs herein.

[Clerk's Certificate]

United States Court of Appeals
TENTH CIRCUIT

First Day, Special Term, Monday, December 12th, 1955

Before:
Hon. ALFRED P. MURRAH,
Hon. JOHN C. PICKETT,
Circuit Judges,
Hon. ROYCE H. SAVAGE,
District Judge,

PACIFIC ROYALTY COMPANY, etc.,
Appellant,

v.

CARL H. WILLIAMS, *et al.,*
Appellees.

JOHNSTONE BATES, *et al.,*
Cross-Appellants,

v.

PACIFIC ROYALTY COMPANY, etc.,
Cross-Appellee.

ORDER DENYING PETITION FOR REHEARING

These causes came on to be heard on the petition of appellees and cross-appellants for a rehearing herein and were submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied. Honorable Alfred P. Murrah, Circuit Judge, voted to grant the petition.

[Clerk's Certificate]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 844

CARL H. WILLIAMS, JOHN W. WILLIAMS, et al.,
Petitioners,

vs.

PACIFIC ROYALTY COMPANY, a corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The unreported Opinions of the District Court are printed in Petitioners' Appendix (App. Pet.) at pp. 21-69. The Opinion rendered by the United States Court of Appeals for the Tenth Circuit is reported at 227 F. 2d 49. (See Appx. Pet., pp. 1-19.) The denial of the Petition for Rehearing by the United States Court of Appeals for the Tenth Circuit is unreported and is printed in Petitioners' Appendix at p. 73.

Jurisdiction

The asserted grounds for jurisdiction are set forth in the Petition.

Question Presented

Should an intemperate and baseless attack on the integrity of a Court of Appeals move this Court to review a decision resolving questions of fact and applying New Mexico law to settle title to real estate in a case of importance only to the litigants themselves.

Statement

I. *Genesis of the Action*

This case involves the title to mineral rights in 320 acres of land in Lea County, New Mexico.

In 1951, one of the attorneys signing the petition for certiorari, a resident of Dallas, Texas, learned of the existence of two alleged claims adverse to the title vested in this Respondent for more than 25 years. The information came from one Kenneth Swanson, also a lawyer and an oil operator. (R. 529.) The alleged claims were traced to the heirs of Lester L. Williams, who died in Texas in 1929 (R. 302), and the heirs of Gertrude Bates, who died in Michigan in 1925. (R. 443.) The claims of the Williams heirs and the Bates heirs were adverse to each other and mutually destructive. (Appx. Pet., p. 8.)

This attorney represented none of these persons and did not know them. (R. 536.) Nonetheless, he sought out the Williams heirs in San Angelo, Texas,[1] and the Bates heirs in Flint, Michigan, using the pretext that he was interested in purchasing their claims with the intention

[1] This was done by directing a long distance telephone operator to call all persons named Williams in San Angelo until she found one who admitted relationship to Lester L. Williams. (R. 543-544.)

of litigating them. (R. 529, 535.) As a result of the contacts so made, the attorney acquired the representation of both groups of heirs on a 50% contingent contract with the attorney to "bet the expenses" and the client not to pay any expense. (R. 539; Def. Ex. 6, R. 859.)[2] The attorney took a conveyance of his 50% interest immediately (R. 860) and thereupon had the two groups of heirs cross-convey half interests in the respective claims in an effort to eliminate the conflict of interest between the adverse claimants he was representing. (Pl. Ex. 5, R. 680, 683.)

Between 1926, when Respondent acquired title, and the date of trial, all witnesses having personal knowledge of the transactions on which the case is based had died. All records and correspondence of the trust company and the mortgage company which were intimately involved in the transaction had been destroyed. (Appx. Pet., p. 3.)[3]

This sudden interest in the title which Respondent had held for so many years is readily explainable. The value of the mineral rights increased from a maximum of $960.00 in 1926 to a value of approximately $1,000,000.00 at the time of trial. (Appx. Pet., p. 12.) In 1948, Respondent had sold an oil and gas lease for a consideration of $96,000.00 in cash, a payment out of oil of $320,000.00, and the usual one-eighth royalty interest. (Pl. Ex. 1, p. 52, R. 644.) Petitioners' attorney was not the first person to have been stimulated by these developments. In 1949, W. H. Gilmore of Midland, Texas, sought out the Bates heirs in Michigan and obtained a conveyance of any claim which they had to the property. (R. 357.) Gilmore then

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[2] Cf. Canons 28 and 42, The Canons of Professional Ethics of the American Bar Association.

[3] As the Court of Appeals said: "What actually happened is difficult to determine, and it must be obtained from somewhat fragmentary correspondence and documents. . . ." (Appx. Pet., p. 3.)

filed suit against this Respondent based on this conveyance. (R. 873 *et seq.*) Becoming convinced that he could not be successful, just prior to trial Gilmore permitted a decree to be entered dismissing his Complaint with prejudice and quieting title against him in the United States District Court. (R. 519, 918.)

In preparation for this action, the attorney representing Petitioners obtained a reconveyance from Gilmore to the Bates heirs. (Def. Ex. 4, R. 854.) He agreed to pay Gilmore and additional sum of $3,000.00 out of his portion of the proceeds of this case, should he be successful. (R. 368.) In addition, this attorney intends to pay over part of his recovery, if successful, to Mr. Kenneth Swanson, the attorney who told him about these title claims. (R. 535.)

The decision of the Court of Appeals was adverse to both the Williams heirs and the Bates heirs. Curiously, however, a writ of certiorari has been sought in this proceeding in behalf of the Williams heirs only, notwithstanding the cross-conveyances between the Bates and Williams heirs, which vested one-half of the claim of each group in the other group. (Pl. Ex. 5, R. 680, 683.)

II. *The Facts*

In 1919, Lester L. Williams, ancestor of Petitioners herein, obtained a patent to a homestead entry embracing the land involved in this case. (Pl. Ex. 1, R. 589.) He subsequently mortgaged the property for $900.00 to the F. B. Collins Investment Co. (Pl. Ex. 21, p. 17, R. 594), which in turn assigned the mortgage to Gertrude A. Bates. (Pl. Ex. 21, p. 20, R. 597.)

In 1920, Mr. Williams sold the land to William C. Stoneman (Pl. Ex. 21, p. 21, R. 598), taking back a mortgage for a portion of the purchase price. (Pl. Ex. 21, p. 22, R. 600.) Williams then moved to Texas. (R. 308.) Stone-

man subsequently became delinquent, and Williams took back the land in satisfaction of the mortgage (Pl. Ex. 21, pp. 24-25, R. 603-604) but never returned to New Mexico. (R. 308.)

Subsequently, Williams became delinquent in his own mortgage payments; and in 1926 the mortgage was forwarded to the Union Mortgage Company of Dallas, Texas, for collection. (Pl. Ex. 10, R. 692.) There was a long standing arrangement between the forwarding agent and the Union Mortgage Company which allowed the latter to make and retain any profit it might realize through the handling of such mortgage securities in excess of the amount required to pay the principal and interest due to the mortgage holder (App. Pet., pp. 3-4.) Mr. J. E. Whitehead was the owner and President of Union Mortgage Company. He and his wife and children also owned a small family corporation, the Pacific Royalty Company, Respondent herein. (R. 173.) The evidence indicates that Mr. Whitehead was also a lawyer but devoted substantially all of his time to Union Mortgage Company. (R. 181.)

Because Mr. Williams had left the land and had never returned, Union Mortgage Company was unsuccessful in its diligent effort to locate him. (Pl. Ex. 10, R. 700-703.) Consequently, suit to foreclose the mortgage was filed on October 20, 1926. (Pl. Ex. 21, p. 45, R. 610.) Later, Mr. Williams was located in San Angelo, Texas. There followed an exchange of correspondence between Whitehead and Williams. (Pl. Ex. 10, R. 711-719.) Petitioners rely on those portions of this correspondence which are still in existence as the basis for their case.

Petitioners would picture Whitehead as a "fraudulent agent" who "inveigled" Williams into conveying his land by means of "multiple misrepresentations." (Petition, p. 3.) Nothing could be further from the truth, and the Court of Appeals so held.

What really happened here has happened thousands of times. The mortgagor, unable to meet the payments, deeds over the land in satisfaction of the mortgage [4] to escape a deficiency judgment. At Whitehead's request, Williams executed the deed to a third person, one C. H. McKinney, correctly labeled by the Court below as a "strawman". (Pl. Ex. 1, p. 34, R. 632; Appx. Pet., p. 13). Williams requested information regarding McKinney's identity and asked if he would be given an opportunity to redeem. Whitehead told him McKinney was a relative of the owner of the mortgage and that Williams could redeem or repurchase the property if he attempted to do so before it was resold. (Pl. Ex. 10, R. 714-715.) While McKinney was not in fact a relative of the Bates family, this fact was, as the Court of Appeals held, immaterial to Williams. (Appx. Pet. p. 12.)

Williams executed the deed on December 11, 1926. Whitehead, in keeping with his agreement, dismissed the foreclosure action on December 18, 1926, the day after the deed was recorded. (Pl. Ex., 1, p. 34, R. 632, 634.) McKinney always understood that he held title for Whitehead (R. 217; Appx. Pet., pp. 13-14); and, in accordance with this understanding, Whitehead, on April 2, 1927, recorded a mineral deed from C. H. McKinney to Whitehead's Pacific Royalty Company, conveying the minerals underlying the Williams land. (Pl. Ex. 1, p. 45, R. 635.)

The land, without the minerals, was subsequently sold to one J. M. Denton by Union Mortgage Company. (R. 247.) The proceeds from the Denton sale were forwarded by Union Mortgage Company to satisfy the mortgage debt

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[4] As testified by one of the Petitioners, Williams' son: "All I remember about it was the business arose there, and I remember Father speaking of it, that he was busy and didn't have time to make the trip; and he just deeded the place over to McKinney to pay off the mortgage." (R. 309.)

(Pl. Ex. 10, R. 752), and the mortgage was released by the Bates estate on August 8, 1930. (Pl. Ex. 1, p. 32, R. 639.) Williams never attempted to repurchase the property; and, after his conveyance to McKinney, no liability was ever asserted against Williams or his heirs for the mortgage indebtedness.

Argument

In a diversity case involving no Federal question and no substantial issue of public importance the Court of Appeals for the Tenth Circuit has rendered a decision applying the New Mexico law relating to actionable fraud in a real estate transaction. This decision considered and rejected all of Petitioners' claims. Lacking any ground for invoking this Court's appellate review, Petitioners have attempted to substitute therefor an attack on the integrity of the Court of Appeals. Petitioners' various arguments are without merit for the following reasons:

I. *Petitioners' Attack on the Court of Appeals is Baseless*

Being unable to present any cogent reasons or legal points upon which to base their Petition for Certiorari, Petitioners have resorted to invective, vituperation and calumniation of the United States Court of Appeals for the Tenth Circuit. At p. 11 of the Petition it is stated:

> "Petitioners submit that the decision in this case reflects **such a departure from an acceptable appellant performance by a court of appeals** as to require exercise by this Court of its supervisory power.
>
> "Not only has the Court below made incorrect application of the law of New Mexico to those facts of the case **which it cared to note**, but, more important, it has shown itself to be **unaware of, or unwilling to treat**, two of the three alleged frauds that were brought to it for review." (Emphasis supplied.)

Further, at p. 12, Petitioners state:

> "Petitioners have been shorn of their district court judgment by a decision which shows on its face **either broad lack of familiarity with the case or an indifference to the issues which it posed.**" (Emphasis supplied.)

These statements are the more astounding upon examination of the decision rendered by the Court of Appeals.

Contrary to the impression Petitioners seek to create, the Court of Appeals gave exhaustive consideration to the issues in the case and all the contentions advanced. The case consisted of both an appeal and a cross-appeal which were briefed separately. Petitioners filed four briefs in the Court of Appeals totalling 284 pages. The record before the Court contained 931 printed pages. After considering this material, and after hearing oral argument, the Court of Appeals rendered a decision which encompasses 19 pages in Petitioners' Appendix. Thereafter, on motion by Petitioners for rehearing, the Court took the unusual step of requiring an answer brief and later permitted a reply thereto to be filed by Petitioners. Not only did the Court consider these three written briefs, it actually heard further oral argument—a rare occurrence on a petition for rehearing. The Court of Appeals then held the petition for rehearing under advisement for some three months before finally overruling it. Clearly, the Court gave most careful consideration to all of Petitioners' contentions before rejecting them. The exaggerated and irresponsible language of the Petition stands in stark contrast to the sound and reasoned Opinion of the Conrt of Appeals.

II. *The Decision Below is Clearly Correct*

The facts in this case can fairly lead to but one conclusion. The Court of Appeals after careful consideration has rendered a decision reaching that conclusion. This is a case in which the owner-mortgagor, having abandoned

his land, voluntarily deeded the property in satisfaction of the mortgage. He received the exact consideration bargained for—satisfaction of his debt. His heirs now seek to retain that consideration and to void the conveyance as well.

Petitioners, by taking out of context a single sentence of the Court's Opinion, seek to show that the Court considered only one of three grounds of fraud alleged in their Complaint. Their statements are refuted by the Opinion itself. Taken in context, it is apparent that the sentence from the Opinion (Appx. Pet., p. 11) quoted at p. 11 of the Petition ("This is the only fraud the plantiffs relied upon in their pleadings") is only part of a detailed consideration by the Court of Appeals of all grounds on which Petitioners relied. The Court of Appeals applied the New Mexico rule that "Fraud, to be actionable, must relate to a present or pre-existing fact. . . ." (Appx. Pet., p. 10.) The Court then correctly concluded that "the only false representation of an existing or pre-existing fact" (Appx. Pet., p. 11) was the representation as to the relationship of McKinney, concerning which the Court said (Appx. Pet., p. 12):

> "Concededly, the statement that McKinney was a relative of Mrs. Bates was false, but a fair analysis of the correspondence indicates that this was of no particular concern to Williams. It is evident that he was willing to convey the land to discharge his obligation under the note and mortgage. It is also quite evident that his inquiry about McKinney was to find out if he could obtain from him a full release of that obligation, including the interest coupons. The record is also clear that Williams received the consideration for which he bargained, that is, a complete release and satisfaction of his obligation under the note and mortgage. Consequently any promise of Whitehead for future action which induced him to execute the deed was performed. The foreclosure suit was dismissed."

III. *No Reason Exists for This Court to Exercise Its Supervisory Authority*

This Court sits to decide cases involving principles of public importance beyond the immediate effect on the private litigants.[5] Petitioners' statement of "Question Presented" (Petition, p. 2), as well as the arguments made in the Petition, recognize that this case involves nothing more than the application of New Mexico law to disputed facts. In petitioning this Court to exercise its "supervisory" authority, Petitioners have cited no valid reason for this Court to disturb the eminently correct decision rendered below. In a thoughtful and exhaustive opinion all of Petitioners' arguments were considered, and the Court of Appeals determined that Petitioners were not entitled to relief. Therefore, the contention that the decision of the Court below shows "on its face either broad lack of familiarity with the case or an indifference to the issues it posed" (Petition, p. 12) can be construed only as a savage attack on the integrity of that Court. Imputing gross negligence to the Court of Appeals, with no basis for the charge, does not make this an appropriate case for review by this Court. In *Layne and Bowler Corporation* v. *Western Well Works*, 261 U.S. 387, 393, the Court said:

> "... it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals."

This language was quoted and relied upon in *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340

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[5] See, e.g., Address of Chief Justice Vinson before the American Bar Association, September 7, 1949, quoted in Stern and Gressman, *Supreme Court Practice* (1954), p. 107.

U. S. 498, and *Rice* v. *Sioux City Memorial Park*, 349 U. S. 70. The principle, of course, has been applied in countless instances.

A bald allegation of "indifference" directed against a lower Court by an unsuccessful litigant should not be enough to evoke the supervisory power of review of the Supreme Court of the United States. Something more is required: a question of real substance and of public importance (and at least a *scintilla* of evidence to support the serious charges against the Court of Appeals). The Petition for Certiorari in this case amounts to nothing more than a request for this Court to review a Court of Appeals' decision applying New Mexico law to disputed facts—a decision, moreover, which is amply supported by the authorities in the Opinion.

As Mr. Justice Jackson and Mr. Justice Frankfurter said in dissenting in *Stack* v. *Boyle*, 342 U.S. 1, 13:

> "And it ought to be noted that this Court will not exercise its certiorari power in individual cases except where they are typical of a problem so important and general as to deserve the attention of the supervisory power."

Petitioners have attempted to excite the curiosity of this Court by imputing gross negligence to the Court below. The only basis for this scurrilous attack is the fact that Petitioners lost in the Court below. Petitioners would provide a guise of importance for this case by imputing frivolity and indifference to the lower Court's actions, but they must do so in the face of an exhaustive and well considered Opinion—the product of an extended consideration of the case. The statement of issues and discussion of law in the Petition do not demonstrate that there has been any departure "from the accepted and usual course of judicial proceedings" (Revised Rules of the Supreme Court of

the United States, Rule 19) or that a problem is involved which is "so important and general as to deserve the attention of the supervisory power." (*Stack* v. *Boyle, supra*).

IV. *There is No Federal Question or Other Ground for Review*

There is no Federal question involved here, nor is any asserted by Petitioners. There are no conflicting decisions by Courts of Appeals which require resolution by this Court. The case involves New Mexico real estate and New Mexico law. When suit was brought, the principals and witnesses to the transactions involved had long since been dead and Respondent had been in quiet possession of the property for more than a quarter of a century. No public interest is involved; only the litigants themselves will be affected by the decision. There is, then, no basis for issuance of the writ of certiorari.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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W. Dean Wagner.

May 8, 1956.

(8878-1)

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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 844

CARL H. WILLIAMS, ET AL.,
Petitioners,

—against—

PACIFIC ROYALTY COMPANY, a corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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IN THE

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OCTOBER TERM, 1955

CARL H. WILLIAMS, *et al.*,
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PACIFIC ROYALTY COMPANY, a corporation,
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No. 844

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Nothing in the brief in opposition detracts from petitioners' contention that important questions of New Mexico law have been decided by the court below in a way that conflicts with the law of that state.

1. In the petition (Pet. p. 7), it was pointed out that the court of appeals regarded the principal question in this case to be

> ". . . whether there was a material misrepresentation by Whitehead which induced the execution and the delivery of the deed and *which would constitute actionable fraud.*" (App. 9) (Emphasis added.)

The essential elements of actionable fraud, as declared by the court of appeals, are

> ". . . a false representation of a material fact, knowledge of its falsity when made, intent to deceive, and reliance thereon with resulting damages." (App. 10)

It is the gravamen of the petition that it was error under the law of New Mexico to impose those tests for actionable fraud in a proceeding to rescind a conveyance.

The brief in opposition does not meet that contention. It seeks to avoid it simply by ignoring it. That tactic of silence is readily explicable. Under the law of New Mexico, it is clear that a deed may be rescinded or canceled if there is any material misrepresentation inducing the conveyance. This is true irrespective of whether the misrepresentation was made with the knowledge of its falsity or with intent to deceive. The true rule has been repeatedly announced by the Supreme Court of New Mexico. That court has most recently said

> "We held in *Jones* v. *Freidman*, 57 N. M. 361, 258 P. 2d 1113, that irrespective of the good faith with which a misrepresentation of material fact is made, if it is justifiably relied on by one seeking rescission of the contract, such rescission should be allowed, and we reaffirm that holding." *Ham* v. *Hart*, 58 N. M. at 552, 273 P. 2d at 749.

The manifest error of the court of appeals in passing on this issue of New Mexico law in itself justifies summary reversal of the judgment below.

2. Both respondent and the court below have conceded that Williams was induced to convey his homestead by Whitehead's false representations. Whitehead misrepresented to Williams (1) that he would be afforded the right to redeem his home, (2) that he would be immediately and finally released from any obligation on his note and mortgage, and (3) that McKinney, the grantee of Williams, was a relative of the Bates, who would hold for that family in order to facilitate settlement of the Bates' Estate.

There can be no question but that the court of appeals failed to regard representations (1) and (2), above, as actionable frauds (App. 11). The court failed so to do be-

cause it apparently believed that those representations did not relate to present or pre-existing facts. As respondent states

> "The court . . . concluded that 'the only false representation of an existing or pre-existing fact' was the representation as to the relationship of McKinney . . ." (Br. in Opp., p. 9).

Refusal by the court of appeals to hold that all three of Whitehead's intentional misrepresentations dealt with present or pre-existing facts conflicts patently with applicable New Mexico law. Under the law of that state, a false representation of intention is a misrepresentation of "present" fact and is sufficient to sustain an action for fraud. See *Werner* v. *City of Albuquerque*, 55 N. M. 189, 229 P. 2d 688; *cf. Telman* v. *Galles*, 41 N. M. 56, 63 P. 2d 1049. The state of a man's mind is as much a matter of fact as is the state of his digestion.

The record clearly shows that Whitehead falsely represented his intentions to Williams, in order to induce that man to convey. Thus, Whitehead committed an intentional falsehood when he promised to deliver the Williams note and mortgage in exchange for a deed (Pl. Ex. 10, R. 188, 715). Whitehead made that promise to Williams upon a further misrepresentation that he then held the Williams note and mortgage* (Pl. Ex. 10, R. 188, 715). Since he made that

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*Clearly, Whitehead's misrepresentation that he had the Williams note and mortgage in hand is a misrepresentation of fact, irrespective of intention. This is so obvious as to render incredible the conclusion of the court of appeals that

> "The only false representation of an existing or pre-existing fact which Whitehead made to Williams was in his letter of November 18, 1926, wherein he wrote Williams that title was being taken in McKinney to prevent the title from becoming involved in the Bates Estate, and that McKinney was a relative who would hold it for the benefit of the estate." (App. 11)

Despite the obvious incongruity of the court's holding, respondent has urged, although without explanation, that the court of appeals was correct in reaching that conclusion. (Br. in Opp., p. 9)

latter representation when he actually held neither the note nor the mortgage (Pl. Ex. 10, R. 188, 745), it is clear that he did not intend to honor the promise he gave. Similarly when Whitehead promised Williams that he might redeem his homestead, he did not intend to keep that promise, inasmuch as it was given long after Whitehead had conveyed the Williams land to respondent (Pl. Ex. 10, R. 188, 714; Pl. Ex. 1, R. 158, 608-610).

CONCLUSION

The petition for writ of certiorari should be granted and the judgment of the court of appeals summarily reversed.

Respectfully submitted,

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May 16, 1956

Rec'd,